

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 659.

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THE CUNARD STEAM SHIP COMPANY, LTD., AND ANCHOR  
LINE (HENDERSON BROS.) LTD., APPELLANTS,

vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, ET AL.

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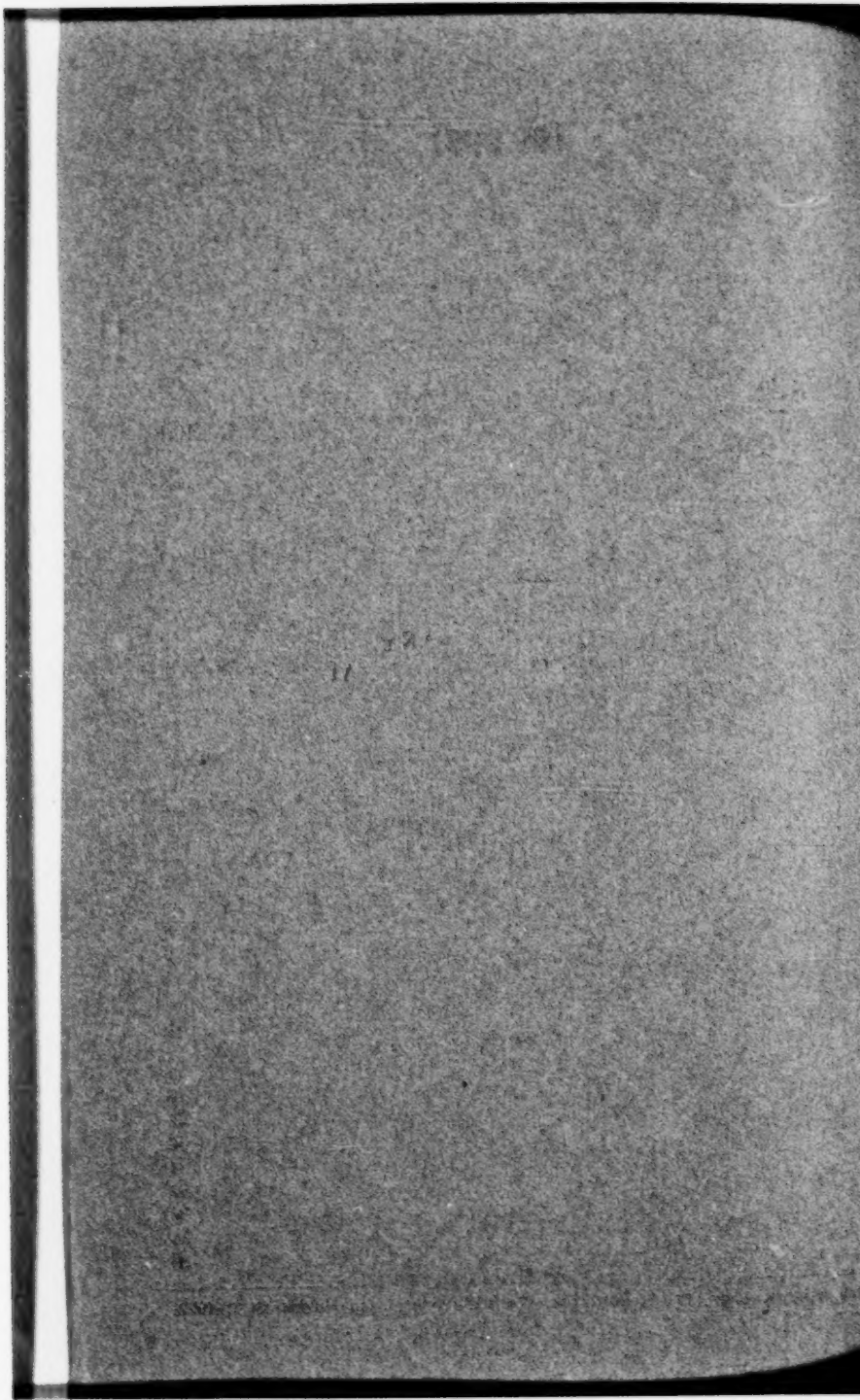
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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FILED OCTOBER 25, 1922.

(29,309)





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*vs.*

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, *ET AL.*

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1

*Equity Subpœna.*

The President of the United States of America to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 11th day of October, in the year One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

[SEAL.]

ALEX GILCHRIST, JR.,  
*Clerk.*LORD, DAY & LORD,  
*Plaintiffs' Sol'rs.*

The defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX GILCHRIST, JR.,  
*Clerk.*

- 2 In the District Court of the United States for the Southern District of New York.

In Equity.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE  
(Henderson Brothers), Limited, Complainants,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, Defendants.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainants, The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited, corporations, bring this, their Bill of Complaint against the above named defendants and respectfully show unto this Honorable Court as follows:

- I. Complainant, The Cunard Steamship Company, Limited, is a corporation duly organized and existing under the laws of the  
3 United Kingdom of Great Britain and Ireland, with its principal place of business in Liverpool, England.

II. Complainant, Anchor Line (Henderson Brothers) Limited, is a corporation duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business at Glasgow, Scotland.

III. Complainants are informed and verily believe and therefore allege on information and belief:

The defendant Andrew W. Mellon is Secretary of the Treasury of the United States, and that said defendant is and his subordinates are by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of the United States and the making of Regulations, promulgated for the purpose of enforcing such Acts of Congress.

The defendant Henry C. Stuart is a subordinate of the said Secretary of the Treasury and is Acting Collector of Customs for the Port of New York, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury which from time to time may be promulgated, within that portion of the

- 4 Port of New York wherein the complainants desire to bring their vessels equipped with certain sea stores as hereinafter set forth.



The defendant Ralph A. Day is a subordinate of the said Secretary of the Treasury and is the Prohibition Director for the State of New York, which State embraces that portion of the Port of New York wherein the complainants desire to bring their vessels equipped as aforesaid, and said defendant is by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under authority of the Eighteenth Amendment to the Constitution of the United States and regulations of executive departments of the United States Government promulgated for the enforcement of such Acts of Congress.

IV. This is a suit of a civil nature arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three thousand Dollars (\$3,000) in value, exclusive of interest and costs.

V. Complainants were incorporated under the laws of the United Kingdom of Great Britain and Ireland for the purpose of carrying on a steamship business and for many years have been engaged in the business of transporting, as common carriers, passengers and cargo for hire on the high seas, and, in transacting such business, the complainants maintain and operate fleets of steamships which ply between ports of the United Kingdom and other ports of Europe (more especially the ports of France and Italy) and the United States.

All of said steamships are British vessels built and registered in Great Britain and not in the United States and fly the British flag. More than twenty-four of such ships carry passengers. Said ships are worth many millions of dollars and they ply regularly and frequently between European ports and the Port of New York. Complainants lease piers known as Piers Numbers 53, 54, 56, 64 and 71 North River, New York City.

VI. The crews operating complainants' vessels, including those carrying passengers and cargo and those carrying cargo alone, are made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic liquors for beverage purposes is not prohibited and by whose customs the use of alcoholic liquors for beverage purposes is so widespread that complainants would experience the greatest difficulty in obtaining adequate crews to operate their vessels running to the United States if they were prohibited from furnishing a usual and reasonable amount of liquor to members of the crews.

VII. Three of the ships of the complainant, The Cunard Steamship Company, Limited, ply regularly between Italian ports and the Port of New York, and other vessels of such complainant occasionally ply between such ports. A considerable number of the crews of such vessels plying from Italian ports are Italian citizens. On such vessels said The Cunard Steamship Company, Limited, carries many third class passengers, and for the accommodation of such passengers it is necessary for the Company to carry a number

of Italian stewards. The Italian law requires that certain officers and members of the crew shall be Italian when third class Italian passengers are carried.

VIII. Complainants allege, on information and belief, that the laws of the Kingdom of Italy provide certain requirements regarding the quantity and quality of the food and alcoholic liquors to be supplied to third class passengers carried between the ports of the United States and the ports of Italy. Among other things, said laws provide that said third class passengers must be furnished with one-half a liter per day of Italian wine containing not less than twelve per cent alcohol, and the rules and regulations established by the Italian Seamen's Federation which have the approval of the Government of the Kingdom of Italy, provide, regarding the Italian members of the crew, that boys and young men who are members

7 of the crew must receive not less than half a liter of wine per day containing not less than twelve per cent alcohol, and that all other seamen must receive three-quarters of a liter of wine per day containing not less than twelve per cent of alcohol, and that firemen and greasers during the time the ship is under way shall receive not less than one liter of wine per day containing twelve per cent alcohol.

Pursuant to the laws of Italy, complainants' vessels cannot sail from the Port of New York for an Italian port and transport more than fifty Italian citizens as third class passengers unless the vessel has received a license from the Italian Consul. Such license cannot be issued until the supplies and wine on board the vessel have been tested by an Inspector of Immigration attached to the Italian Consulate. This license cannot be issued unless there is a sufficient quantity of wine containing not less than twelve per cent of alcohol on board said vessel to furnish the third class passengers during the voyage with the amount of wine required by the Italian law.

IX. The compensation received by complainants for the carriage of passengers amounts in the aggregate to many millions of dollars annually. In the year 1921 more than Twenty-five Million  
8 Dollars (\$25,000,000.) was received by the complainants from such passenger business.

Among the passenger vessels regularly crossing the North Atlantic from European ports are many which land at Canadian ports, and if your complainants are prohibited from furnishing their passengers with alcoholic beverages a large number of passengers, who would otherwise have patronized complainants' ships, will patronize lines landing at Canadian ports.

The prohibition of the use of alcoholic liquors on complainants' vessels as sea stores, for the reasonable use of crew and passengers, would cause your complainants great pecuniary loss by reason of the difficulty of obtaining crews, and would cause an annual loss of receipts from passenger business exceeding One Million Dollars (\$1,000,000.) a year, and will involve irreparable damage to your com-

plainants, in that it will destroy a considerable part of their business and render a considerable part of their equipment useless and cause a loss of their profits.

X. Since the adoption of the so-called National Prohibition Act on October 28, 1919, complainants' ships have been permitted freely to go and come in the Port of New York and to carry intoxicating liquors for beverage purposes as sea stores for crew and passengers, pursuant to the regulations of the Secretary of the Treasury, which provided that such liquor should be locked up and sealed with customs seals upon the arrival of the vessel at the territorial waters of the United States and kept so sealed until said vessel left such territorial waters.

XI. All of the alcoholic liquors carried as such sea stores on complainants' vessels are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for sea stores is taken on board complainant's vessels at European ports, and no part of such liquors is intended to be landed in the United States.

XII. Complainants are informed and verily believe and therefore allege, that on or about the sixth day of October, 1922, the Attorney General of the United States rendered a ruling or opinion in which, among other things he ruled that foreign ships carrying intoxicating beverage liquors as ships stores, within the three mile limit of our shores, are violating the provisions of the National Prohibition Act prohibiting possession or transportation of intoxicating liquor for beverage purposes, and that thereafter the President of the United States directed the defendant, the Secretary of the Treasury, to proceed to the formulation of regulations for the enforcement of such ruling with respect to foreign ships.

Complainants are informed and believe that the defendant, the Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States and threaten to enforce said Prohibition Act as interpreted by the Attorney General.

XIII. Complainants are advised by counsel and verily believe that the aforesaid rulings by the Attorney General in respect to foreign ships carrying intoxicating beverage liquors as ships stores for crew or passengers, and any regulations formulated by the Secretary of the Treasury for the enforcement of such ruling are and will be unauthorized and void because neither the Eighteenth Amendment nor the National Prohibition Act prohibit the carriage of such liquors as such sea stores for crew and passengers, and an interference with the carriage of such sea stores would, therefore, violate complainants' rights under existing treaties between the United States and Great Britain and otherwise.

XIV. Complainants are advised by counsel, and verily believe, that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders said Act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional.

XV. Complainants allege that the defendant, Andrew W. Mellon, or his subordinates, are preparing regulations, and that pursuant to said opinion of the Attorney General of such regulations,  
12 the defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart and Ralph A. Day, are threatening, notwithstanding the fact that the interpretation of the Act of Congress, known as the National Prohibition Act, by the Attorney General is erroneous, unauthorized and void and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said National Prohibition Act if it purports to prohibit the carriage of said alcoholic beverages as sea stores for crew and passengers, is unconstitutional and void for the reasons hereinabove stated, it is, nevertheless, the intent and threat of the defendants herein to seize said alcoholic liquors now constituting sea stores on complainant's vessels (some of which are now on the high seas bound for the Port of New York) and to enforce against the complainants, its officers, agents and servants, various pains and penalties, including fines and imprisonment, and various forfeitures of property provided by the Acts of Congress and regulations and thus involve the complainants, their officers, agents and servants, in  
13 numerous suits and by such threats to prevent complainants, their employees and servants, from carrying out its contracts in the Port of New York, and thus deprive the Complainants of their business; all to the irreparable damage of Complainants, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, Complainants would be involved in numerous suits if they were forced to bring an action at law to relieve its employees and property from such penalty and forfeiture. Complainants allege that in order successfully to carry on its business of transporting passengers and freight to the ports of the United States, it is necessary and essential for it to make contracts with passengers and crew, which contracts under the laws of Italy, as above set forth, must provide for the furnishing of Italian wines as aforesaid, and that such contracts must be made prior to the departure of your Complainant's ships from the ports of Italy; that unless the Complainants can immediately procure from this Honorable Court relief in the premises, no such contracts can reasonably or safely be made; that there will be in that event a cessation of Complainant's business for an indefinite and probably considerable time; such ces-

14 sation of business will involve irreparable damage to Complainants in that it will destroy a considerable part of their business and renders a considerable part of their equipment useless.

Forasmuch, therefore, as complainants are without remedy in the premises, except in a court of equity and to the end that they may obtain from this Honorable Court the relief to which they are entitled, they respectfully pray that the above named defendants and each of them be directed to make a full, true and perfect answer to this Bill of Complaint, but not under oath, an answer under oath being expressly waived, and that said defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainants, their officers, servants and employees, or any of them, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General, and from arresting and prosecuting the complainants, their officers, agents, servants or employees, or any of them, or on account of any alleged violation by them, or any of them, of the Eighteenth Amendment or the National Prohibition Act, on the ground or claim that

15 the carriage of said intoxicating liquors as aforesaid as sea stores for crew and passengers is contrary to law.

Complainants further pray that they be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause whereby the defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainant further prays that a writ of subpoena be issued herein directed to said defendants, commanding them on a day set to appear and answer the Bill of Complaint herein.

THE CUNARD STEAMSHIP COMPANY,  
LIMITED,

By T. ASHLEY SPARKS,

*Agent.*

ANCHOR LINE (HENDERSON BROTHERS), LTD.,

By T. ASHLEY SPARKS,

*Agent.*

LORD, DAY & LORD,

*Solicitors for Complainants,*

*25 Broadway, New York City.*

LUCIUS H. BEERS,

FRANKLIN B. LORD,

*Of Counsel for Complainants.*



16 SOUTHERN DISTRICT OF NEW YORK,  
County of New York, ss:

On this 11th day of October, 1922, before the undersigned, a Notary Public, duly commissioned and sworn, appeared Sir T. Ashley Sparks, K. B. E., who being duly sworn deposes and says, that he is the General Agent in the United States of and for The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited, the complainants in the above entitled suit; that he has read the foregoing Bill of Complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated upon information, and as to those matters he believes them to be true.

T. ASHLEY SPARKS.

Sworn to before me this 11th October, 1922.

[SEAL.]

EMILIO TRIPPITELLI,  
Notary Public, Kings County.

Certificate filed in New York County.

My commission expires 3/30/24.

17 In the District Court of the United States for the Southern  
District of New York.

In Equity.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE  
(HENDERSON BROTHERS), LIMITED, Complainants,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendents.

On reading the annexed Bill of Complaint, let the defendants herein show cause before this Court at a Term thereof for the hearing of motions to be held at Room 237 the Post Office Building, Borough of Manhattan, City of New York, on the 17th day of October, 1922, at 2:30 p. m. in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made restraining the defendants, their agents, servants and subordinates, during the pendency of this suit, from seizing, disturbing, removing or in any way interfering with intoxicating beverages, liquors or wines or any of them carried on complainants' ships as ship's stores, as more particularly set forth in the Bill of Complaint herein, and restraining the defendants, their agents, servants and subordinates, during the pendency of this suit, from seizing, disturbing or in any way interfering with complainants' said ships by reason of

the carriage thereon of said intoxicating beverages, liquors and wines as such ship's stores, and why the complainants should not have such other and further relief as may be just.

Sufficient cause appearing, service of a copy of this order on the defendants on or before the 13th day of October, 1922, shall be sufficient service.

Dated, New York, October 11th, 1922.

LEARNED HAND,  
*United States District Judge.*

19 U. S. District Court, Southern District of New York.

E. 25/6.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE  
(HENDERSON BROTHERS), LTD., Complainants,

versus

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Notice of Appearance and Demand.*

You will please take notice that I am retained by, and appear as attorney for, the Defendants in this action, and demand service of a copy of the complaint and all papers in this action upon me, at my office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours,

WILLIAM HAYWARD,  
*United States Attorney,  
Attorney for Defendants.*

New York, October 13, 1920.

To Lord, Day & Lord, Esqs., Attorneys for Plaintiffs, 25 Broadway, New York.

20 In the District Court of the United States for the Southern District of New York.

In Equity.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE  
(HENDERSON BROTHERS), LIMITED, Complainants,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States,  
Henry C. Stuart, Acting Collector of Customs for the Port of New  
York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, Defendants.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainants, The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited, corporations, bring this, their Amended Bill of Complaint against the above named defendants and respectfully show unto this Honorable Court as follows:

I. Complainant, The Cunard Steamship Company, Limited, is a corporation duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business in Liverpool, England.

21 II. Complainant, Anchor Line (Henderson Brothers) Limited, is a corporation duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business at Glasgow, Scotland.

III. Complainants are informed and verily believe and therefore allege on information and belief:

The defendant Andrew W. Mellon is Secretary of the Treasury of the United States, and that said defendant is and his subordinates are by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of the United States and the making of Regulations, promulgated for the purpose of enforcing such Acts of Congress.

The defendant Henry C. Stuart is a subordinate of the said Secretary of the Treasury and is Acting Collector of Customs for the Port of New York, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury which from time to time may be promulgated, within that portion of the Port of New York wherein the complainants desire to bring their vessels equipped with certain sea stores as hereinafter set forth.

The defendant Ralph A. Day is a subordinate of the said Secretary of the Treasury and is the Prohibition Director for the State of New York which State embraces that portion of the

22 Port of New York wherein the complainants desire to bring their vessels equipped as aforesaid, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress passed under authority of the Eighteenth Amendment to the Constitution of the United States and regulations of executive departments of the United States Government promulgated for the enforcement of such Acts of Congress.

IV. This is a suit of civil nature, arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000.) in value, exclusive of interest and costs.

V. Complainants were incorporated under the laws of the United Kingdom of Great Britain and Ireland for the purpose of carrying on a steamship business and for many years have been engaged in the business of transporting, as common carriers, passengers and cargo for hire on the high seas, and, in transacting such business, the complainants maintain and operate fleets of steamships which ply between ports of the United Kingdom and other ports of Europe (more especially the ports of France and Italy) and the United States.

All of said steamships are British vessels built and registered in Great Britain and not in the United States and fly the British

23 flag. More than twenty-four of such ships carry passengers. Said ships are worth many millions of dollars and they ply regularly and frequently between European ports and the Port of New York. Complainants lease piers known as Piers Numbers 53, 54, 56, 64 and 71 North River, New York City.

VI. The crews operating complainants' vessels, including those carrying passengers and cargo and those carrying cargo alone, are made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic liquors for beverage purposes is not prohibited and by whose customs the use of alcoholic liquors for beverage purposes is so widespread that complainants believe they would experience the greatest difficulty in obtaining adequate crews to operate their vessels running to the United States if they were prohibited from furnishing a usual and reasonable amount of liquor to members of the crews.

None of the intoxicating liquors so kept as sea stores for reasonable use of passengers and crew have been manufactured, sold or transported within, imported into, or exported from the United States or any territory subject to the jurisdiction of the United States. All wines and other intoxicating liquors kept as sea stores on complainants' vessels as aforesaid have been legally acquired.

24 VII. Three of the ships of the complainant, The Cunard Steamship Company, Limited, ply regularly between Italian ports and the Port of New York, and other vessels of such complain-

ant occasionally ply between such ports. A considerable number of the crews of such vessels plying from Italian ports are Italian citizens. On such vessels said The Cunard Steamship Company, Limited, carries many third class passengers, and for the accomodation of such passengers it is necessary for the Company to carry a number of Italian stewards. The Italian law requires that certain officers and members of the crew shall be Italian when thir class Italian passengers are carried.

VIII. Complainants allege, on information and belief, that the laws of the Kingdom of Italy provide certain requirements regarding the quantity and quality of the food and alcoholic liquors to be supplied to third class passengers carried between the ports of the United States and the ports of Italy. Among other things, said laws provide that said third class passengers must be furnished with one-half a liter per day of Italian wine containing not less than twelve per cent alcohol, and the rules and regulations established by the

25 Italian Seamen's Federation which have the approval of the Government of the Kingdom of Italy, provide, regarding the Italian members of the crew, that boys and young men who are members of the crew must receive not less than half a liter of wine per day containing not less than twelve per cent alcohol, and that all other seamen must receive three-quarters of a liter of wine per day containing not less than twelve per cent of alcohol, and that firemen and greasers during the time the ship is under way shall receive not less than one liter of wine per day containing twelve per cent alcohol.

Pursuant to the laws of Italy, Complainants' vessels cannot sail from the Port of New York for an Italian port and transport more than fifty Italian citizens as third class passengers unless the vessel has received a license from the Italian Consul. Such license cannot be issued until the supplies and wine on board the vessel have been tested by an Inspector of Immigration attached to the Italian Consulate. This license cannot be issued unless there is a sufficient quantity of wine containing not less than twelve per cent of alcohol on board said vessel to furnish the third class passengers during the voyage with the amount of wine required by the Italian law.

IX. The compensation received by Complainants for the carriage of passengers amounts in the aggregate to many millions  
26 of dollars annually. In the year 1921 more than Twenty-five million Dollars (\$25,000,000) was received by the Complainants from such passenger business.

Among the passenger vessels regularly crossing the North Atlantic from European ports are many which land at Canadian ports, and if your Complainants are prohibited from furnishing their passengers with alcoholic beverages a large number of passengers, who would otherwise have patronized Complainants' ships, will patronize lines landing at Canadian ports.

The prohibition of the use of alcoholic liquors on Complainants' vessels as sea stores, for the reasonable use of crew and passengers, would cause your Complainants great pecuniary loss by reason of the difficulty of obtaining crews, and would cause a great loss of receipts



from their passenger business and will involve irreparable damage to your Complainants, and Complainants believe it will destroy a considerable part of their business and render a considerable part of their equipment useless and cause a loss of their profits.

27 X. Since the adoption of the so-called National Prohibition Act on October 28, 1919, Complainants' ships have been permitted freely to go and come in the port of New York and to carry intoxicating liquors for beverage purposes as sea stores for crew and passengers, pursuant to the regulations of the Secretary of the Treasury hereto annexed and marked Schedule A and Schedule B, and reference thereto is prayed.

In reliance upon and under the authority of the above mentioned Treasury Decision and the Regulations promulgated in connection therewith and the procedure always followed as above described, complainants in good faith purchased in foreign ports and now have on board their vessels on the high seas bound for the United States, as sea stores, quantities of intoxicating liquor of a value in excess of Three Thousand Dollars (\$3,000).

XI. All of the alcoholic liquors carried as such sea stores on Complainants' vessels are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for sea stores is taken on board Complainants' vessels at European ports, and no part of such liquors is intended to be landed in the United States.

28 XII. Complainants are informed and verily believe and therefore allege that on or about the 6th day of October, 1922, the Attorney General of the United States rendered a ruling or opinion in which, among other things, he ruled that foreign ships carrying intoxicating beverage liquors as ships' stores, within the three mile limit of our shores, are violating the provisions of the National Prohibition Act prohibiting possession or transportation of intoxicating liquor for beverage purposes, and that thereafter the President of the United States directed the defendant, the Secretary of the Treasury, to proceed to the formulation of regulations for the enforcement of such ruling with respect to foreign ships.

Complainants are informed and believe that the defendant, the Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States and threaten to enforce said Prohibition Act as interpreted by the Attorney General.

XIII. Complainants are advised by counsel and verily believe that the aforesaid ruling by the Attorney General in respect to foreign ships carrying intoxicating beverage liquors as ship's stores for crew or passengers, and any regulations formulated by the Secretary of the Treasury for the enforcement of such ruling are and will be  
29 unauthorized and void because neither the Eighteenth Amendment nor the National Prohibition Act prohibits the

carriage of such liquors as such sea stores for crew and passengers, and an interference with the carriage of such sea stores would, therefore, violate complainants' rights under existing treaties between the United States and Great Britain and otherwise, and also would deprive complainants of their property without due process of law.

XIV. Complainants are advised by counsel and verily believe that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders said Act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon and in the exercise of the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional.

XV. Complainants allege that the defendant, Andrew W. Mellon, or his subordinates, are preparing regulations, and that pursuant to said opinion of the Attorney General or such regulations, the  
 30 defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart and Ralph A. Day, are threatening, notwithstanding the fact that the interpretation of the Act of Congress, known as the National Prohibition Act, by the Attorney General, is erroneous, unauthorized and void and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said National Prohibition Act if it purports to prohibit the carriage of said alcoholic beverages as sea stores for crew and passengers, is unconstitutional and void for the reasons hereinabove stated, it is, nevertheless, the intent and threat of the defendants herein to seize said alcoholic liquors now constituting sea stores on complainants' vessels (some of which are now on the high seas bound for the Port of New York) and to enforce against the complainants, its officers, agents and servants, various pains and penalties, including fines and imprisonment, and various forfeitures of property provided by the Acts of Congress and regulations and thus involve the complainants, their officers, agents and servants, in numerous suits and by such threats to  
 31 prevent complainants, their employees and servants, from carrying out its contracts in the Port of New York, and thus deprive the complainants of their business; all to the irreparable damage of complainants, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainants would be involved in numerous suits if they were forced to bring an action at law to relieve its employees and property from such penalty and forfeiture. Complainant, The Cunard Steamship Company, Ltd., alleges that in carrying on its business of transporting passengers and freight to the ports of the United States, it has made contracts with passengers and crew, which contracts under the laws of Italy, as above set forth, must provide for the furnishing of Italian wines as aforesaid, and that such contracts must be made prior to the departure of said complainants' ships from

the ports of Italy; that unless the said complainant can immediately procure from this Honorable Court relief in the premises, no such contracts can reasonably or safely be made; complainants believe they will suffer irreparable damage in that a considerable part of their business will be destroyed and a considerable part of their equipment rendered useless.

For as much, therefore, as complainants are without remedy in the premises, except in a court of equity and to the end that  
 32 they may obtain from this Honorable Court the relief to which they are entitled, they respectfully pray that the above named defendants and each of them be directed to make a full, true and perfect answer to this Bill of Complaint, but not under oath, an answer under oath being expressly waived, and that said defendants their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainants, their officers, servants and employees, or any of them, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General, and from arresting and prosecuting the complainants, their officers, agents, servants or employees, or any of them, or on account of any alleged violation by them, or any of them, of the Eighteenth Amendment or the National Prohibition Act, on the ground or claim that the carriage of said intoxicating liquors as aforesaid as sea stores for crew and passengers is contrary to law.

Complainants further pray that they be granted a restraining order and preliminary injunction pending the final hearing  
 33 and decision of this cause whereby the defendants, their agents, servants, subordinates and employees, and each and every one of them be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainants further pray that a writ of subpoena be issued herein directed to said defendants commanding them on a day set to appear and answer the Bill of Complaint herein.

THE CUNARD STEAMSHIP COMPANY, LIMITED,  
 By T. ASHLEY SPARKS,

*Agent.*

ANCHOR LINE (HENDERSON BROTHERS) LTD.,  
 By T. ASHLEY SPARKS,

*Agent.*

LORD, DAY & LORD,

*Solicitors for Complainants.*

25 Broadway, New York City.

LUCIUS H. BEERS,  
 FRANKLIN B. LORD,

*Of Counsel for Complainants.*

34 SOUTHERN DISTRICT OF NEW YORK,  
*County of New York, ss:*

On this 16th day of October, 1922, before the undersigned, a Notary Public, duly commissioned and sworn, appeared Sir T. Ashley Sparks, K. B. E., who being duly sworn deposes and says, that he is the General Agent in the United States of and for The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited, the complainants in the above entitled suit; that he has read the foregoing Bill of Complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated upon information, and as to those matters he believes them to be true.

T. ASHLEY SPARKS.

Sworn to before me this 16th day of October, 1922.

[SEAL.]

THOMAS F. LARKIN,

*Notary Public.*

New York County Clerk's No. 354.

New York County Register's No. 4296.

Commission expires March 30, 1924.

35

SCHEDULE A.

(Copy.)

(T. D. 38218.)

Sea Stores—Liquors.

Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 106 and 107 of the Customs Regulations of 1915 as amended.

Treasury Department, December 11, 1919.

To Collectors of Customs and Others Concerned:

All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

Excessive or surplus liquor stores are no longer dutiable, being prohibited importations, but are subject to seizure and forfeiture.

36

Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the

coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same Line or owner.

Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(Signed)

JOUETT SHOUSE,  
*Assistant Secretary.*

(99623.)

SCHEDULE B.

(Copy.)

(T. D. 38248.)

Sea Stores.—Liquors.

Opinion of the Attorney General with respect to the practice under T. D. 38218 of sealing liquors listed as sea stores on vessels while in ports of the United States. Distinction made between American and foreign vessels. T. D. 38218 amended.

Treasury Department, January 27, 1920.

To Collectors of Customs and Others Concerned:

Attention is invited to the appended copy of an opinion rendered the Department by the Attorney-General with respect to the practice under T. D. 38218 of sealing liquors carried as sea stores on all vessels while in the ports of the United States, as indicated by the questions submitted to him.

Following the opinion of the Attorney-General the first paragraph of T. D. 38218 is hereby amended to read as follows:

All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on foreign vessels should be sealed on arrival of the vessel in port, and such portions thereof released from time to time for use by the officers and crew.

The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification.

JOUETT SHOUSE,  
*Assistant Secretary.*

(108377.)



39 United States District Court, Southern District of New York

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE  
(HENDERSON BROTHERS), LIMITED, Complainants,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for  
the State of New York, Defendants.

*Answer to Amended Bill of Complaint.*

Now come the defendants herein and in answer to the amended bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the amended bill of complaint herein and divers parts thereof be dismissed, and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.

2. The Court has no jurisdiction to grant the relief prayed for or any part thereof.

3. The bill does not present a cause of action in equity under the Constitution of the United States.

4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

40 6. It appears from the bill that the complainants have a plain, adequate and complete remedy at law.

Second. In answer to the allegations set out in paragraph six of the complaint the defendants allege on information and belief that any difficulty which complainants might experience in obtaining adequate crews from among the nationals of countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread would be readily obviated by the payment of higher wages to said crews. Defendants are further informed and believe that many of the vessels of the American Merchant Marine carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages and that the said American vessels have never had the least difficulty in obtaining adequate crews from the nationals of such countries at the same wages paid to American crews.

Third. Defendants deny the allegations contained in paragraph thirteenth of the amended bill of complaint that the ruling made by the Attorney General referred to in said paragraph is and any regulations for the enforcement of such ruling are and will be unauthorized and void. Defendants further deny the allegation that such ruling and such regulations would violate complainants' rights under existing treaties between the United States, Great Britain and otherwise.

Fourth. Defendants deny the allegation contained in paragraph fourteenth of the amended bill of complaint that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is correct, it renders said Act unconstitutional and void for the reason that the National Prohibition Act was adopted by the

Congress in reliance upon, and in the exercise of, the powers  
41 given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional. The defendants allege on the other hand that it is well within the powers of Congress delegated to it by the Eighteenth Amendment to the Constitution of the United States to declare the possession of intoxicating liquor to be unlawful and that such legislative declaration contained in the National Prohibition Act is a valid exercise of the legislative power and has a reasonable relation to the enforcement of the constitutional mandate.

For a separate and distinct defense herein, defendants allege:

Fifth. Defendants re-allege and re-affirm as part of this separate and distinct defense each and every allegation contained in paragraphs First to Fourth above.

Sixth. Defendants are informed by their attorney and therefore allege that if the complainants are correct in their construction of the National Prohibition Act the implications involved are exceedingly serious and the claim of the complainants if allowed, would carry with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States.

Seventh. Defendants are further informed and believe and therefore allege that for two years last past a large and profitable business has been carried on by divers persons with the object and result of importing liquor into this country contrary to law; that the vessels  
42 used by such persons are vessels under foreign registry and such vessels sail from foreign ports with clearance papers showing that they are bound for other foreign ports. The actual destination of such vessels is not the port shown in their clearance papers but some point on the high seas near the coast of the United States from which its liquors are transferred to smaller boats which complete the smuggling and importation of the liquor into the United States. Up to the present time the vigilance of the customs officials in seizing such vessels when they came within the territorial limits of the United States has somewhat mitigated the evils

of this traffic but if, as complainants contend, it is only necessary to put liquors under lock and key to make such transportation legal and foreign vessels can sail our territorial waters at will with cargoes of liquor, the enforcement of the prohibition against the importation of liquors, already difficult, will become practically impossible.

Eighth. The rulings of the Secretary of the Treasury referred to in the bill of complaint have already been used as a cloak to hide smuggling operations and if the doctrine underlying such rulings is declared to be the law as claimed by complainants, defendants verily believe that its use as a cloak for such operations will greatly increase. As an instance of the use of such regulations to hide smuggling defendants allege that on or about January 15, 1920, the British passenger steamship "Harbinger" sailed from Halifax, N. S., for Havana, Cuba, carrying with her a large quantity of intoxicating liquors listed as sea stores. The said vessel came into the port of Portland,

43 Maine, alleging a shortage of coal, and there her liquor was sealed under customs seals. Her master protested her innocence and claimed the right as a foreign vessel to transport intoxicating liquors as sea stores under seal within the territorial waters of the United States. This right was accorded her under the Treasury rulings until recently in force and on which complainants have relied until now. Being under suspicion, however, the "Harbinger" was convoyed by the coastguard cutter "Ossipee" to Cape Ann whence she entered the port of Boston and thence proceeded without convoy to the neighborhood of New York where she was met by the coastguard cutter "Gresham" which convoyed her to New York. On January 26th, she was convoyed down New York Bay by the coastguard cutter "Manhattan" to Dunham Shipyard, Staten Island. There she remained under customs surveillance until February 6th when the customs seals on the liquors were broken by the crew and an attempt was made to import them into the United States. When such attempt was made the crew of said vessel were arrested. Two have plead guilty to a violation of the Prohibition Act and the vessel has been libelled by the Government. After the crew were arrested it became evident that the journey of this vessel down the coast of the United States was not, as alleged and as appeared, because of insufficient coal-carrying space but for the purpose of finding purchasers of the liquor carried as sea stores.

Ninth. Defendants further allege that under the regulations of the Secretary of the Treasury referred to in the complaint herein, customs officers have made no physical inventory of the stores of liquors on any foreign ships either upon their arrival in the ports of the United States or upon their leaving such ports. Permission has been given to remove certain of the liquors under seal for the purposes of rations given to the crews, but no record is kept of the amount of liquor which actually leaves United States ports on foreign vessels, nor is any inventory returned by such foreign vessels of the amount of liquors actually found when seals are broken at the territorial limits of the United States.

Tenth. Defendants are informed and verily believe that the complainants make large profits from the sale of intoxicating liquors on the high seas, such profits amounting to many thousand dollars per annum and further allege that loss of such profit is the only definitely ascertainable loss which the complainant- will suffer if the National Prohibition Act as interpreted by the ruling of the Attorney General is given full force and effect.

Eleventh. Defendants further allege on information and belief that the sale of intoxicating liquors on the high seas by vessels carrying the American flag ceased with the issuance of the ruling of the Attorney General and is not now carried on. And defendants verily believe that if vessels of foreign registry are by the injunction of this Court facilitated in the sale of liquor on the high seas by being allowed to transport liquor within the territorial waters of the United States, the resultant damage to the American merchant marine will be great and irreparable. Not only will ships of the American merchant marine suffer the loss of revenue which they have hitherto enjoyed from the sale of intoxicating liquors on the high seas and which ships of foreign nations will continue to enjoy if the prayer of the complainants herein is granted, but defendants believe that a

45 large number of passengers who would otherwise travel on American ships and who would travel on American ships if both American ships and foreign ships were placed in the same position in regard to the sale of liquor on the high seas, will travel on foreign ships and the American ships will lose a large amount of revenue thereby. Defendants are informed and verily believe that the loss of such revenue from the sales of liquor and from passage money in case of a differential treatment giving preference to foreign ships over American ships in the matter of transportation of intoxicating liquors within the territorial waters of the United States, will be sufficient to make it impossible for the American merchant marine to compete profitably with ships of foreign registry. The majority of the American passenger liners operating in the North Atlantic trade, in competition with complainants' and other foreign vessels are owned and operated directly by the United States Government. Any loss of revenue by reason of a differential treatment favorable to foreign ships will fall directly on the United States Government and its tax-payers.

Wherefore, defendants pray that the amended bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,  
*United States Attorney for the Southern District  
of New York, Attorney for Defendants.*

Office & P. O. Address: U. S. Courts & P. O. Building, Borough of Manhattan, City of New York.

46 United States District Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE  
(HENDERSON BROTHERS), LTD.,

against

ANDREW W. MELLON, Secretary of the Treasury of the United  
States, et al.,

And Ten Other Cases.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decrees upon the answers. The pleadings have been so drawn on both sides as to raise the merits of the controversy, and it is not necessary to set them forth in detail.

The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and liquors as part of their sea-stores. This was done with the consent of the public authorities who promulgated regulations recognizing the practise, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an opinion at

47 that time given by the Attorney General, was that, as part of the ship's stores, these wines and liquors, if sealed and kept on board, were not to be regarded as brought within the country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where the peace of the sovereign is at stake. Later the permission so given was further extended to allow the ships to dispense to their crews their customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of *Grogan v. Walker*, and *Anchor Line v. Aldridge*, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration, on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying in and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed to execute the law in accordance with this opinion, and this created the situation out of which these bills arise.

The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in

Europe so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal, and carried out again, only for the entertainment of passengers embarking from the United States. Besides the wines and liquors so used the steamers carry a stock for the use of their crews. In the case of the French, Italian and Belgian ships the law of their flag requires them to supply a ration of wine and in those cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore, the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign lines; they have freely sold their wines and liquors at sea and brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some cases the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the Zone Officer, but the Collector of the Port of New York and the local Prohibition Director are defendants in all.

#### Appearances:

Hon. Van Vechten Veeder, for Oceanic Steam Navigation Co., Ltd., Liverpool, Brazil & River Plate Steam Navigation Co., Ltd., United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., the Netherlands American Steamship Co., (Holland America Line) and Pacific Steam Navigation Company.

Lucius H. Beers, Esq., for The Cunard Steamship Co., Ltd., and Anchor Line (Henderson Brothers).

Joseph P. Nolan, Esq., for Compagnie Generale Transatlantique.

Reid L. Carr, Esq., for United American Lines, et al.

Cleatus Keating, Esq., and John M. Woolsey, Esq., for International Mercantile Marine and International Navigation Co., Ltd.

William Hayward, Esq., United States Attorney, and John Holley Clark, Esq., Assistant U. S. Attorney, for Defendants in all cases.

#### 49 LEARNED HAND, D. J.:

It is conceded, and indeed could not be disputed, after *Grogan v. Walker and Anchor Line v. Aldridge*, decided May 15, 1922, that, had the liquors here in question been a part of the ship's cargo, the bills would not lie. It makes no difference that they were not to be broached while carried within territory of the United States; the carriage would be transportation none the less. But because they are part of the ship's stores, in the sense that that term is generally understood, the plaintiffs argue that they do not fall within the same rule. This argument rests upon two alternative premises, first, that "transportation" involves a place where, and a person to whom,



the goods are to be delivered, and second, that a ship's stores have by long custom been treated as a part of the "furniture," *Brough v. Whitmore*, 4 Term R. 206, or "appurtenances," *The Dundee*, 1 Hagg. Adm. 109, of the ship, which do not without particular mention become subject to the municipal law of the ports into which she enters, any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I do not see how that would help the plaintiffs. These liquors are carried for delivery at sea to the passengers and crew, and when so delivered their transportation ends. There appears to me no significant distinction in the fact that the place of delivery is the ship itself. The passengers, and for that matter, the crew, are not the same person as the owner, and if the passage of title or possession has anything to do with the matter, the title to, and possession of, the bottle or the dram, passes when it is handed to its consumer. The carriage within the limits of the Port of New York is a part of a

transit whose purpose from the beginning is that very delivery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to search out and coal at sea friendly cruisers during war, as happened in 1914.

Therefore, I might admit the plaintiffs' interpretation of the word, if it were necessary. Nevertheless, it seems to me at best very doubtful whether it carries with it any such limitation. The cases on which the plaintiffs rely come only to this, that the jurisdiction of the United States under the interstate commerce clause does not terminate until delivery after a transit across State lines, *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196, *Rhodes v. Iowa*, 170 U. S. 412, *Louisville & Nashville R. R. v. Cook Brewing Co.*, 223 U. S. 70, *Dan-eiger v. Cooley*, 248 U. S. 319. From this it does not follow that the term, "transportation," as used in this statute, implies delivery to another than the person who carries the liquors. Suppose, for example, a parcel of liquor, made after the Amendment, and carried off to be laid away in a cache. There can be no question, I believe, that two separate crimes would be committed, "manufacture" and "transportation."

Nor does it seem to me that the thirteenth and fourteenth sections of Title II of the Prohibition Act, help the plaintiffs. Under these, carriers are required to mark the consignor's and consignee's names on the outside of all packages. But it does not follow that a regulation like this of one kind of transportation imputes to the word itself any of the conditions which it enacts. In common use to transport means to carry about, and I see no reason why it should mean less in Section three. The law clearly intended by immobilizing

liquor to make surreptitious traffic in it impossible, and its policy would as well cover movements which might be incidental to, as those which immediately terminated in, a delivery to someone else. The case of *Street v. Lincoln Safe Deposit Company*, 254 U. S. 88, did not decide anything to the contrary; it turned upon the fact that the possession of the liquor in the leased room and in the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the



cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as Street had, for the possession of the liquor. I conclude therefore that the carriage in question is "transportation."

The first point being thus disposed of, I come to the second. It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States, (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they must be manifested and may not be excessive in quantity, as such they are not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbade generally the transportation of liquors, it must be read in the light of this statute and the long usage under it, and that what is not within the United States for the purposes of customs ought not to be so for purposes of prohibition. In addition they urge that under the maritime law it is held that for most purposes sea-stores will be treated as a part of the ship herself. If she is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and least of all a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to these, *Brown v. Duchesne*, 19 How. 183, *Taylor v. U. S.*, 207 U. S. 120, *Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122. Nevertheless, everyone must agree that the question is no more than one of interpretation, for in the cases at bar Congress certainly might, if it chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

*Grogan v. Walker*, supra, and *Anchor Line v. Aldridge*, supra, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thorough-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the Amendment, and its very want of particularity is a good index that it meant to cover what it could. For this reason it is to be distinguished from earlier local acts of the same kind, as for example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed,

specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful, since in form it only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the policy, and not the promise, of the nation. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

54 However, the motives for positively assuming that such stores must be considered as included within Section three appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legislative motives is speculative, but that vice, if it be one, is of the plaintiffs' making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitations on that meaning, because of the supposed intent of Congress. Since, therefore, I am asked to have recourse to implications, I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises.

In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan v. Walker*, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the law runs for all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and

55 kept here. Ignoring for the moment the crews, all of the stocks are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law. The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question; it must be enough for him that each is forbidden.

56 It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the section covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crews' rations stood in different positions. Probably none was intended,

and I mention it only against the possibility that it might be taken later.

Cases like *Brown v. Duchesne*, supra, *Taylor v. U. S.*, supra, and *Scharrenberg v. U. S.*, supra, are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning of Section three accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is *sui generis*, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages. It is true that the prayers for relief do include so much, but prayers without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs than anything I may think about the law. The power under the Seventy-fourth Rule to grant such an order is undoubted, notwithstanding a dismissal of the bill, *Merriman River Savings Bank v. City of Clay Center*, 219 U. S. 527, *Staffords v. King*, 90 Fed. R. 136 (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he holds his decree. Like all such matters, it depends upon a balance between the two, and I must assume that the chances of success are not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some nicety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far as the loss of the liquors themselves is concerned the damage cannot be said to be irreparable. These must be condemned before they can be forfeited, and in the present state of the calendars the cases at bar will be finally determined long before such libels can be

tried. If I am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the long acquiescence of the authorities in the practices here in question will moderate the ultimate penalty of confiscation; I must assume that the plaintiffs will receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as part of the crew's ration. If the ration is cut off, some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages to stay the enforcement of the law against stocks of wine and liquor necessary for crew's rations, if honestly kept and dispensed for that purpose alone.

As to the maintenance of passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing inter se and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is easy to say, if one does not take seriously the opinion behind the Amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury which no judge has the right to ignore. The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is.

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge, the plaintiffs have no case. Therefore I will go no further than to issue an injunction against interfering with the carriage of a stock necessary for the crews' rations on the east-bound voyage. The plaintiffs must each give a bond in the sum of twenty-five thousand dollars, conditional against the use of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal, if the same be taken at once. Settle orders on notice.

October 23, 1922.

LEARNED HAND,  
D. J.

61 At a Stated Term of the District Court of the United States for the Southern District of New York held in the Court Rooms thereof, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 24th day of October, 1922.

Present: Honorable Learned Hand, District Judge.

In Equity.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE  
(HENDERSON BROTHERS), LIMITED, Complainants,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, Defendants.

*Order Dismissing Complaint.*

This cause came on to be heard at this term upon motions by the defendants to dismiss the amended bill of complaint and by the plaintiffs for a final decree in their favor on the pleadings, and was argued by counsel; and thereupon, upon consideration thereof, it was

62 Ordered, adjudged and decree that the amended bill of complaint herein be dismissed and defendants have judgment against the complainants for their costs to be taxed, and it is further

Ordered, adjudged and decreed that until final hearing of this cause in the Supreme Court of the United States and the entry of an order or decree on the mandate of that Court, the defendants, their servants, agents and subordinates, be and they hereby are stayed and restrained from seizing or interfering with the possession or carriage by complainants herein of a stock of liquors customary for the rations of the crews of complainant's vessels upon each eastbound voyage, upon the filing of a bond in the penal sum of twenty-five thousand dollars (\$25,000), conditioned against the gift, issuance or sale of such stock of liquors by complainants otherwise than as crews' rations to the crews of complainants' vessels; and it is further

Ordered, adjudged and decreed that if complainants shall fail to take an appeal herein to the Supreme Court of the United States within five days from the entry hereof, or to move for preference on



first motion days, the defendants may move herein to vacate the injunction granted above.

LEARNED HAND,  
*U. S. D. J.*

63 In the District Court of the United States for the Southern District of New York.

In Equity.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE  
(HENDERSON BROTHERS), LIMITED, Complainants,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

The complainants above named, The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers), Limited, corporations conceiving themselves aggrieved by the final decree made and entered in the above entitled cause on the 24th day of October, 1922, do hereby appeal from such final decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, from which it appears that this cause is appealable directly from this court to the said Supreme Court of the United States under Section 238 of the Judicial Code, and said The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited, pray that they be allowed this appeal and that a transcript of the record, papers, and proceedings, upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, October 24th, 1922.

LORD, DAY & LORD,  
*Solicitors for Complainants.*

Office & P. O. Address, 25 Broadway, New York City.

Appeal allowed.

LEARNED HAND,  
*Judge.*



65 &amp; 66

*Citation on Appeal.*

By the Honorable Learned Hand, One of the United States District Judges for the Southern District of New York, in the Second Circuit, to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the City of Washington, District of Columbia, within 30 days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Cunard Steamship Company, Ltd., and Anchor Line (Henderson Brothers, Ltd.) are appellants and you are the appellees to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 24th day of October, in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

## LEARNED HAND,

*United States District Judge for the Southern  
District of New York, in the Second Circuit.*

67 In the District Court of the United States for the Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE  
(HENDERSON BROTHERS), LIMITED, Complainants,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

Now come the complainants, The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited, Corporations, and file the following assignment of errors upon which they will rely on their appeal from the final judgment or decree entered on the 24th day of October, 1922:

First. The Court erred in dismissing the bill of complaint herein.

68 Second. The Court erred in denying the petition for an injunction.

Third. The Court erred in holding that the Eighteenth Amendment prohibits a foreign ship from keeping on board while on the territorial waters of the United States intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fourth. The Court erred in holding that the National Prohibition Act prohibits a foreign ship from keeping on board, while on the territorial waters of the United States, intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the crew as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken  
69 on board for such purpose in a foreign country.

Sixth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the passengers as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Seventh. That the National Prohibition Act as construed and applied by the District Court is unconstitutional and void because enforcement thereof with respect to sea stores on the complainants' vessels would deprive the complainants of their property and subject them to penalties without due process of law.

Eighth. The Court erred in holding that the keeping on board of complainants' vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the third and fourth assignments of error constitutes a transportation of the same within the prohibition  
70 of the Eighteenth Amendment and the National Prohibition Act.

Ninth. The Court erred in holding that the keeping on board of complainants' vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the Fifth and Sixth Assignments of error constitutes

a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Tenth. The Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverages in the circumstances mentioned in the Third, Fourth, Fifth and Sixth assignments of error is prohibited by the Eighteenth Amendment and the National Prohibition Act.

Eleventh. The Court erred in refusing to hold that the interpretation of the National Prohibition Act mentioned in the Ninth assignment of error rendered the same unconstitutional and invalid and not within the powers conferred upon the Congress by the Constitution.

71       Wherefore, complainants-appellant- pray that the said decree or judgment of the United States District Court for the Southern District of New York be reversed and an injunction granted the complainants as prayed for in its amended Bill of Complaint herein and for such other and further relief as to the Court may seem just and proper.

Dated, New York, October 24, 1922.

LORD, DAY & LORD,  
*Solicitors for Complainants-Appellants.*

Office & P. O. Address, #25 Broadway, Borough of Manhattan,  
City of New York.

72       *Stipulation on Appeal Record.*

United States District Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LTD., and Another,

vs.

ANDREW W. MELLON et al.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated October 24th, 1922.

LORD, DAY & LORD,  
*Attorney- for Complainants.*  
WM. HAYWARD,  
*Attorney for Defendants.*

73 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE  
(HENDERSON BROTHERS), LTD.,

vs.

ANDREW W. MELLON et al.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 24th day of October, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of the District Court of the United States, Southern  
District of N. Y.]

ALEX GILCHRIST, JR., *Clerk.*

Endorsed on cover: File No. 29,209. S. New York D. C. U. S. Term No. 659. The Cunard Steamship Company, Ltd., and Anchor Line (Henderson Bros.), Ltd., appellants, vs. Andrew W. Mellon, Secretary of the Treasury of the United States, et al. Filed October 25th, 1922. File No. 29,209.

(7625)

# **TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1922.**

**No. 660.**

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**THE OCEANIC STEAM NAVIGATION COMPANY, LTD.,  
APPELLANT,**

**vs.**

**ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, ET AL.**

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.**

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**FILED OCTOBER 25, 1922.**

**(29,310)**

(29,210)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 660.

THE OCEANIC STEAM NAVIGATION COMPANY, LTD.,  
APPELLANT,

*vs.*

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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1 Office Copy.

Equity Subpœna.

The President of the United States of America to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by The Oceanic Steam Navigation Company, Limited, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you, of two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 13th day of October, in the year One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

ALEX. GILCHRIST, JR.,  
*Clerk.*

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
*Complainant's Sol'rs.*

The Defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX. GILCHRIST, JR.,  
*Clerk.*

2 In the District Court of the United States for the Southern District of New York.

THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED, Complainant  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, Defendants.

*Order to Show Cause and Restraining Order.*

On reading the annexed complaint and the Court being satisfied that the complainant will suffer immediate irreparable loss or damage before the motion hereon can be heard and determined unless a temporary restraining order be granted as hereinafter provided, pending the hearing and determination of said motion, and due deliberation having been had, it is ordered

1. That the defendants show cause before this Court, at a term thereof for the hearing of motions, to be held at Room 237 Post Office Building, Borough of Manhattan, City of New York, on the 17 day of October, 1922, at 10.30 o'clock A. M. of that day, or as soon thereafter as counsel can be heard, why an order should not be made herein restraining defendants, their successors, agents, servants and subordinates, during the pendency of this suit, from seizing, disturbing, removing or in any way interfering with wines, liquors or other intoxicating beverages on board complainant's ships as sea stores or medicines, as more particularly set forth in the said bill of complaint herein, from seizing, disturbing or in any way interfering with the complainant's ships by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages as ship's stores, as more particularly set forth in said bill of complaint, and restraining the defendants, their successors, agents, servants and subordinates, during the pendency of this suit, from enforcing or attempting to enforce or causing to be enforced against the complainant, its officers, agents or servants or any of them, or any of its steamships, any of the pains, penalties or forfeitures provided in and by the so-called National Prohibition Act enacted by Congress pursuant to the Eighteenth Amendment to the Federal Constitution; and from refusing to issue to complainant or its steamers, permits for clearance from the port of New York, or in any way interfering with the arrival or departure of any of complainant's steamers, by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages, as ship's stores, as more particularly set forth in the bill of complaint herein; and why the complainant should not have such other and further relief in the premises as may be just.

2. That the complainant have leave until the hearing under this order, to serve such additional papers and affidavits in support of the motion hereunder for an injunction pendente lite in this action, as it may deem wise.

3. That until the hearing of this motion under this order to show cause, the defendants, their successors, agents, servants and subordinates and each of them be and hereby are restrained from seizing, disturbing, removing or in any way interfering with wines, liquors or other intoxicating beverages on board complainant's ships as sea stores or medicines, as more particularly set forth in the said bill of complaint herein; from seizing, disturbing or in any way interfering with the complainant's ships by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages as ship's stores, as more particularly set forth in said bill of complaint, and from enforcing or attempting to enforce or causing to be enforced against the complainant, its officers, agents or servants, or any of them, or any of its steamships, any of the pains, penalties or forfeitures provided in and by the so-called National Prohibition Act enacted by Congress pursuant to the Eighteenth Amendment to the Federal Constitution; and from refusing to issue to complainant or its steamers, permits for clearance from the port of New York, or in any way interfering with the arrival or departure of any of the complainant's steamers, by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages, as said ship's stores, as more particularly set forth in the bill of complaint herein.

4. That service of a copy of this order on the defendants on or before October 14, 1922, shall be and be deemed to be sufficient service, and that such service may be made by personal service thereof on the said defendants or by leaving a copy of this order at the offices of said defendants.

LEARNED HAND,  
*United States District Judge.*

5 & 6      Dated: New York, October 13, 1922, 5:20 P. M.

[Endorsed:] E 25—9. District Court of the United States, Southern District of New York. The Oceanic Steam Navigation Co. Limited, Complainant, vs. Andrew W. Mellon, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants. Copy Restraining Order. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

- 7 In the District Court of the United States for the Southern District of New York.

In Equity.

THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED,  
Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Complaint.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainant, the Oceanic Steam Navigation Company, Limited, brings this its Bill of Complaint against the above named defendants and respectfully shows as follows:

I. Complainant, The Oceanic Steam Navigation Company, Limited, is a corporation duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business in Liverpool, England.

II. Complainant is informed and verily believes and therefore alleges on information and belief:

The defendant Andrew W. Mellon is Secretary of the Treasury of the United States and he is, and his subordinates are, by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of the United States and the making of Regulations promulgated for the purpose of enforcing such Acts of Congress.

8 The defendant Henry C. Stuart is a subordinate of said Secretary of the Treasury, and is Acting Collector of Customs for the Port of New York, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury which from time to time may be promulgated, within that portion of the Port of New York wherein the complainant desires to bring its vessels equipped with certain sea stores as hereinafter set forth.

The defendant Ralph A. Day is a subordinate of the said Secretary of the Treasury and is the Prohibition Director for the State of New York, which State embraces that portion of the Port of New York wherein the complainant desires to bring its vessels equipped as aforesaid, and said defendant is by law charged with the duty of

enforcing the terms and provisions of the Acts of Congress passed under authority of the Eighteenth Amendment to the Constitution of the United States and regulations of executive departments of the United States Government promulgated for the enforcement of such Acts of Congress.

III. This is a suit of a civil nature arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000) in value, exclusive of interest and costs.

IV. Complainant was incorporated under the laws of the United Kingdom of Great Britain and Ireland for the purpose of carrying on a steamship business and for many years has been engaged in the business of transporting, as a common carrier, passengers and cargo for hire on the high seas, and, in transacting such business, the complainant maintains and operates fleets of steamships which ply between ports of the United Kingdom and the United States.

All of said steamships are British vessels built and registered in Great Britain and not in the United States, and fly the British flag. Complainant owns 23 passenger steamers of a total gross tonnage of 435,869, and 4 freight steamers of a total gross tonnage of 32,487. Of these steamers 14 passenger steamers, of a total gross tonnage of 322,407, trade regularly between European and United States ports. Said steamers are worth many millions of dollars, and any interruption of their regular services causes great loss and damage to complainant, the extent of which it is impossible to estimate. Complainant occupies in the City of New York Piers Nos. 59 and 60, North River, which are leased from the City of New York. The compensation received by complainant for the carriage of passengers amounts in the aggregate to many millions of dollars annually.

V. The crews operating complainant's vessels, including those carrying passengers and cargo and those carrying cargo alone, are made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic liquors for beverage purposes is not prohibited and by whose customs the use of alcoholic liquors for beverage purposes is so widespread that complainant would experience the greatest difficulty in obtaining adequate crews to operate their vessels running to the United States if they were prohibited from furnishing a usual and reasonable amount of liquor to members of the crews.

VI. Complainant maintains a regular service between the United States and Italian ports. By Italian law the complainant is required, as a condition of maintaining this service, to carry, as part of its sea stores on its vessels, a prescribed quantity of wine for consumption by passengers and crew, and to pass in this respect the inspection of the Italian commissioners both in this country and in Italy. If complainant is prevented from including such wines in its sea stores in conformity with the Italian law, it

will be wholly prevented from continuing in such passenger trade with Italy.

Among passenger vessels regularly crossing the North Atlantic from European ports are many which land at Canadian ports, and if your complainant is prohibited from furnishing its passengers with alcoholic beverages a large number of passengers, who would otherwise have patronized complainant's ships, will patronize lines landing at Canadian ports.

A considerable portion of passengers traveling to and from the United States by complainant's ships consists of through passengers from one foreign country to another by way of the United States. As these passengers are largely foreigners, accustomed to the use of wines and liquors with their meals, if complainant is prevented from furnishing wines and liquors to them while on the high seas, they will travel by steamers of other lines not touching at United States ports.

VII. The prohibition of the use of alcoholic liquors on complainant's vessels as sea stores, for the reasonable use of crew and passengers, would cause your complainant great pecuniary loss by  
 11 reason of the difficulty of obtaining crews, and would cause an annual loss of receipts from passenger business of many thousand dollars a year, and will involve irreparable damage to your complainant, in that it will destroy a considerable part of its business and render a considerable part of its equipment useless and cause a loss of its profits.

VIII. It has at all times heretofore been the practice of complainant's vessels, in common with other British vessels, to carry as part of their sea stores certain wines, liquors and other intoxicating beverages for consumption by the vessel's passengers and crew, such sea stores, including such wines, liquors and other intoxicating beverages, being the property of the complainant and on board solely for such consumption on board and not for transportation or landing in the United States or elsewhere, and upon arrival of any vessel in the United States an accurate list of all such sea stores, including such wines, liquors and other intoxicating beverages, being furnished to the United States authorities.

Since the adoption of the so-called National Prohibition Act of October 28, 1919, complainant's ships have been permitted freely to come and go in the port of New York and other ports and territorial waters of the United States with such sea stores, including such wines, liquors and other intoxicating beverages, on board, under regulations of the Secretary of the Treasury providing in substance that the said wines, liquors and other intoxicating beverages should, while any vessel is within the jurisdiction of the United States, be placed under seal of the United States customs officials and be under  
 12 the exclusive control of such officials. The complainant has at all times been ready and willing to conform to, and has conformed, to such regulations, and upon arrival of any of complainant's vessels within the jurisdiction of the United States such vessel has immediately been boarded by the United States cus-

toms officials, who thereupon placed such wines, liquors and other intoxicating beverages under seal and assumed exclusive control thereof until the same were unsealed by such customs officials upon the vessel's again leaving the jurisdiction of the United States.

By British law British vessels are required to maintain on board for medicinal purposes a certain quantity of wines and liquors.

IX. All of the alcoholic liquors carried as such sea stores on complainant's vessels are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for sea stores is taken on board complainant's vessels at European ports, and no part of such liquors is intended to be landed in the United States.

X. On or about October 5, 1922, as complainant is informed and believes, the Attorney General of the United States transmitted an opinion to the Secretary of the Treasury, in which, among other things, he stated that the sale, transportation or possession of intoxicating liquors for beverage purposes on foreign vessels while in territorial waters of the United States is prohibited by said National Prohibition Act. Thereafter the President of the United States directed that said National Prohibition Act be enforced in accordance with said opinion of the Attorney General, and directed  
13 the Secretary of the Treasury to proceed to the formulation of regulations for the enforcement of said law in accordance with said opinion of the Attorney General with respect to foreign ships.

Complainant is informed and believes that the defendant the Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States and threaten to enforce said Prohibition Act as so interpreted by the Attorney General. By order of the President of the United States, as complainant is informed and believes, the said regulations will not apply to foreign vessels sailing for the United States on or before October 14. The complainant's passenger steamer Majestic, however, sails from Southampton, England, for the United States on October 18, and others of complainant's vessels will shortly from time to time thereafter be sailing from foreign ports for the United States, and, unless restrained, the defendants intend, as complainant is informed and believes, upon arrival of said vessels within the United States, to seize all wines, liquors or other intoxicating beverages on board and included in the sea stores of said vessels, and threaten also to seize the vessels themselves as being in violation of said National Prohibition Act and subject to the penalties therein provided; and any such seizure of said wines, liquors or other intoxicating beverages constituting part of said sea stores of said vessels for use and consumption of passengers and crews as aforesaid, or seizure of said vessels themselves, will  
14 disrupt the sailings of complainant's vessels, prevent the performance of obligations incurred in respect thereof, de-



prive the complainant of a large volume of patronage, and result in barring it from the Italian trade and otherwise cause loss, damage and difficulties to the complainant, to its great and irreparable loss and injury.

XI. Complainant is advised by counsel, and verily believes, that the aforesaid ruling by the Attorney General in respect to foreign ships carrying intoxicating beverage liquors as ships' stores for crew or passengers as aforesaid, and any regulations formulated by the Secretary of the Treasury for the enforcement of such ruling, are and will be unauthorized and void because neither the Eighteenth Amendment nor the National Prohibition Act prohibits the carriage of such liquors as such sea stores for crew and passengers as aforesaid, and an interference with the carriage of such sea stores would, therefore, violate complainant's rights under the law and under existing treaties between the United States and Great Britain and otherwise.

XII. Complainant is advised by counsel, and verily believes, that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders said Act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional.

15

XIII. Complainant alleges that the defendant, Andrew W. Mellon, or his subordinates, are preparing regulations, and that pursuant to said opinion of the Attorney General or such regulations, the defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart and Ralph A. Day, are threatening, notwithstanding the fact that the interpretation of the Act of Congress, known as the National Prohibition Act, by the Attorney General is erroneous, unauthorized and void and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said National Prohibition Act, if it purports to prohibit the carriage of said alcoholic beverages as sea stores for crew and passengers, is unconstitutional and void for the reasons hereinabove stated, to seize said alcoholic liquors now constituting sea stores on complainant's vessels, and to enforce against the complainant, its officers, agents and servants, various pains and penalties, including fines and imprisonment, and various forfeitures of property provided by the Acts of Congress and regulations, and thus involve the complainant, its officers, agents and servants, in numerous suits and by such threats to prevent complainant, its employees and servants, from carrying out its contracts, and thus deprive the complainant of its business; all to the irreparable damage of complainant, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainant would be involved in numerous

suits if it were forced to bring an action at law to relieve its employees and property from such penalty and forfeiture.

Forasmuch, therefore, as complainant is without remedy in the premises, except in a court of equity, and to the end that it  
 16 may obtain from this Honorable Court the relief to which it is entitled, it respectfully prays that the above named defendants and each of them be directed to make a full, true and perfect answer to this Bill of Complaint, but not under oath, an answer under oath being expressly waived, and that said defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainant, its officers, servants and employees, or any of them, or complainant's steamships, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General, and from arresting and prosecuting the complainant, its officers, agents, servants or employees, or any of them, and from refusing to issue to the complainant and/or its steamers permits for clearance from the port of New York, or in any way interfering with the arrival or departure of the complainant's steamers, for or on account of any alleged violation by them, or any of them, or on account of any alleged violation by them, or any of them, of the Eighteenth Amendment or the National Prohibition Act, on the ground or claim that the carriage or possession of said intoxicating liquors as aforesaid as sea stores for crew and passengers is contrary to law; or from molesting or otherwise interfering with the complainant in the peaceful possession of said intoxicating liquors on board such vessels as part of their sea stores.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and  
 17 decision of this cause whereby the defendants, their agents, servants, subordinates and employees, and each and every one of them be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainant further prays that a writ of subpœna be issued herein directed to said defendants, commanding them on a day set to appear and answer the Bill of Complaint herein.

THE OCEANIC STEAM NAVIGATION  
COMPANY, LIMITED,

By P. A. S. FRANKLIN,  
*Agent.*

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

27 William Street, Borough of Manhattan, New York City.

18-19 STATE OF NEW YORK,  
County of New York:

Philip A. S. Franklin, being duly sworn, says:

I am Managing Agent of Oceanic Steam Navigation Company Ltd., the complainant herein. I have read the foregoing bill of complaint and know the contents thereof and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and the grounds of my belief as to all matters in said bill of complaint not stated to be on my knowledge are an examination of documents and other papers in my possession relating to the subject matter of this suit. The reason why this verification is not made by the complainant is that it is a foreign corporation.

P. A. S. FRANKLIN.

Sworn to before me, this 13th day of October, 1922.

C. M. SMITH,

Notary Public, Westchester Co., N. Y.

Certificate filed in New York County.

Clerk's No. 188. Reg. No. 4310.

Commission expires March 30, 1924.

20 [Endorsed:] E. 25-9. E. 25-9. District Court of the United States, Southern District of New York. The Oceanic Steam Navigation Company, Limited, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Copy. Bill of Complaint. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City. O. K., J. H. C. Oct. 13, 1922. Wm. Hayward, U. S. Attorney, Atty. for Defts.

21 In the District Court of the United States for the Southern District of New York.

In Equity.

THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED, Complainant  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States  
Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Amended Complaint.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainant, The Oceanic Steam Navigation Company, Limited, brings this its amended Bill of Complaint against the above named defendants and respectfully shows as follows:

I. Complainant, The Oceanic Steam Navigation Company, Limited, known as The White Star Line, is a corporation duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business in Liverpool, England.

II. Complainant is informed and verily believes and therefore alleges on information and belief:

The defendant Andrew W. Mellon is Secretary of the Treasury of the United States and he is, and his subordinates are, by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of the United States and the making of Regulations promulgated for the purpose of enforcing such Acts of Congress.

22 The defendant Henry C. Stuart is a subordinate of said Secretary of the Treasury, and is Acting Collector of Customs for the Port of New York, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury which from time to time may be promulgated, within that portion of the port of New York wherein the complainant desires to bring its vessels equipped with certain sea stores as hereinafter set forth.

The defendant Ralph A. Day is a subordinate of the said Secretary of the Treasury and is the Prohibition Director for the State of New York, which State embraces that portion of the port of New York wherein the complainant desires to bring its vessels equipped as aforesaid, and said defendant is by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under authority of the Eighteenth Amendment to the Constitution of the United States and regulations of executive departments of the United States Government promulgated for the enforcement of such Acts of Congress.

III. This is a suit of a civil nature arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three thousand (\$3,000) Dollars in value, exclusive of interest and costs.

IV. Complainant was incorporated under the laws of the United Kingdom of Great Britain and Ireland for the purpose of carrying on a steamship business and for many years has been engaged in the business of transporting, as a common carrier, passengers and cargo for hire on the high seas, and, in transacting such business, the complainant maintains and operates fleets of steamships which ply between ports of the United Kingdom and the United States.

23 All of said steamships are British vessels built and registered in Great Britain and not in the United States and fly the British flag. Complainant owns 23 passenger steamers of a total gross tonnage of 435,869, and 4 freight steamers of a total gross tonnage of 32,487.

Of these steamers 14 passenger steamers, of a total gross tonnage of 322,407 trade regularly between European and United States ports. Said steamers are worth many millions of dollars, and any interruption of their regular services causes great loss and damage to complainant, the extent of which it is impossible to estimate. Complainant occupies in the City of New York Piers Nos. 59 and 60, North River, which are leased from the City of New York. The compensation received by complainant for the carriage of passengers amounts in the aggregate to many millions of dollars annually.

V. The crews operating complainant's vessels, including those carrying passengers and cargo and those carrying cargo alone, are made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic liquors for beverage purposes is not prohibited and by whose customs the use of alcoholic liquors for beverage purposes is so widespread that complainant believes it would experience the greatest difficulty in obtaining adequate crews to operate their vessels running to the United States if they were prohibited from furnishing a usual and reasonable amount of liquor to members of the crews.

VI. Complainant maintains a regular service between the United States and Italian ports.

By Italian law the complainant is required, as a condition of maintaining this service, to carry, as part of its sea stores on its vessels a prescribed quantity of wine for consumption by 24 passengers and crew, and to pass in this respect the inspection of the Italian commissioners, both in this country and in Italy. If complainant is prevented from including such wines in its sea stores in conformity with the Italian law, it will be wholly prevented from continuing in such passenger trade with Italy. Complainant alleges that in carrying on its business of transporting passengers and freight to the ports of the United States, it has made contracts with passengers and crew, which contracts under the law of Italy, must provide for the furnishing of Italian wines as aforesaid, and that such contracts must be made prior to departure of said complainant's ships from the ports of Italy; that unless said complainant can immediately procure from this Honorable Court relief in the premises no such contract can reasonably or safely be made; and complainant believes that its business will suffer irreparable damage, in that a considerable part of said business will be destroyed and a considerable part of complainant's equipment rendered useless.

Among passenger vessels regularly crossing the North Atlantic from European ports are many which land at Canadian ports, and if your complainant is prohibited from furnishing its passengers with alcoholic beverages, it believes a large number of passengers, who would otherwise have patronized complainant's ships, will patronize lines landing at Canadian ports.

A considerable portion of passengers traveling to and from the United States by complainant's ships consists of through passengers

from one foreign country to another by way of the United States. As these passengers are largely foreigners, accustomed to the use of wines and liquors with their meals, if complainant is prevented from furnishing wines and liquors to them while on the high seas, it believes they will travel by steamers of other lines not touching at United States ports.

25 VII. The prohibition of the use of alcoholic liquors on complainant's vessels as sea stores, for the reasonable use of crew and passengers, it is believed would cause your complainant great pecuniary loss by reason of the difficulty of obtaining crews, and would cause a great annual loss of receipts from its passenger business, and will involve irreparable damage to your complainant; and complainant believes it will destroy a considerable part of its business and render a considerable part of its equipment useless and cause a loss of its profits.

VIII. It has at all times heretofore been the practice of complainant's vessels, in common with other British vessels, to carry as part of their sea stores, certain wines, liquors and other intoxicating beverages for reasonable use by the vessel's passengers and crew, such sea stores, including such wines, liquors and other intoxicating beverages being the property of the complainant and on board solely for such consumption on board and not for transportation or landing in the United States or elsewhere, and upon arrival of any vessel in the United States an accurate list of all such sea stores, including such wines, liquors and other intoxicating beverages, being furnished to the United States authorities. None of the intoxicating liquors so kept as sea stores for reasonable use of passengers and crew have been manufactured, sold or transported within, imported into, or exported from the United States or any territory subject to the jurisdiction of the United States. All wines and other intoxicating liquors kept as sea stores on complainant's vessels as aforesaid have been legally acquired.

Since the adoption of the so-called National Prohibition Act of October 28, 1919, complainant's ships have been permitted freely to come and go in the port of New York and other ports and territorial waters of the United States with such sea stores, including such wines, liquors and other intoxicating beverages, on board, under regulations of the Secretary of the Treasury hereto annexed and marked Schedules A and B, and reference thereto is prayed. In reliance upon and under the authority of the above mentioned Treasury decision and the regulations promulgated in connection therewith, and the procedure always followed as above described, complainant in good faith purchased in foreign ports and now has on board its vessels on the high seas, bound for the United States, as sea stores, quantities of intoxicating liquor of a value in excess of Three thousand (\$3,000) Dollars. The complainant has at all times been ready and willing to conform to, and has conformed, to such regulations and upon arrival of any of complainant's vessels within the jurisdiction of the United States, such vessel has immedi-

ately been boarded by the United States customs officials, who thereupon placed such wines, liquors and other intoxicating beverages under seal and assumed exclusive control thereof until the same were unsealed by such customs officials upon the vessel's again leaving the jurisdiction of the United States.

By British law British vessels are required to maintain on board for medicinal purposes, a certain quantity of wines and liquors.

IX. All of the alcoholic liquors carried as such sea stores on complainant's vessels, are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for sea stores is taken on board complainant's vessels at European ports, and no part of such liquors is intended to be landed in the United States.

27 X. On or about October 5, 1922, as complainant is informed and believes, the Attorney General of the United States transmitted an opinion to the Secretary of the Treasury, in which, among other things, he stated that the sale, transportation or possession of intoxicating liquors for beverage purposes on foreign vessels while in territorial waters of the United States is prohibited by said National Prohibition Act. Thereafter, the President of the United States directed that said National Prohibition Act be enforced in accordance with said opinion of the Attorney General, and directed the Secretary of the Treasury to proceed to the formulation of regulations for the enforcement of said law in accordance with said opinion of the Attorney General with respect to foreign ships.

Complainant is informed and believes that the defendant, the Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States and threaten to enforce said Prohibition Act as so interpreted by the Attorney General. By order of the President of the United States, as complainant is informed and believes, the said regulations will not apply to foreign vessels sailing for the United States on or before October 14. The complainant's passenger steamer *Majestic*, however, sails from Southampton, England, for the United States on October 18, and others of complainant's vessels will shortly from time to time thereafter be sailing from foreign ports for the United States, and unless restrained, the defendants intend, as complainant is informed and believes, upon arrival of said vessels within the United States, to seize all wines, liquors or other intoxicating beverages on board and included in the sea stores of said vessels, and threaten also to

28 seize the vessels themselves as being in violation of said

National Prohibition Act and subject to the penalties thereon provided; and any such seizure of said wines, liquors or other intoxicating beverages constituting part of said sea stores of said vessels for use and consumption of passengers and crews as aforesaid, or seizure of said vessels themselves will disrupt the sailings of complain-



ant's vessels, prevent the performance of obligations incurred in respect thereof, deprive the complainant of a large volume of patronage, and result in barring it from the Italian trade and otherwise cause loss, damage and difficulties to the complainant, to its great and irreparable loss and injury.

XI. Complainant is advised by counsel, and verily believes, that the aforesaid ruling by the Attorney General in respect to foreign ships carrying intoxicating beverage liquors as ship's stores for crew or passengers as aforesaid, and any regulations formulated by the Secretary of the Treasury for the enforcement of such ruling, are and will be unauthorized and void because neither the Eighteenth Amendment nor the National Prohibition Act prohibits the carriage of such liquors as such sea stores for crew and passengers as aforesaid, and an interference with the carriage of such sea stores would, therefore, violate complainant's rights under the law and under existing treaties between the United States and Great Britain and otherwise; and also would deprive complainant of its property without due process of law.

XII. Complainant is advised by counsel, and verily believes, that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders said Act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the  
29 Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional.

XIII. Complainant alleges that the defendant, Andrew W. Mellon, or his subordinates, are preparing regulations, and that pursuant to said opinion of the Attorney General or such regulations, the defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart and Ralph A. Day, are threatening, notwithstanding the fact that the interpretation of the Act of Congress, known as the National Prohibition Act, by the Attorney General is erroneous, unauthorized and void, and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said National Prohibition Act, if it purports to prohibit the carriage of said alcoholic beverages as sea stores for crew and passengers, is unconstitutional and void for the reasons hereinabove stated, to seize said alcoholic liquors now constituting sea stores on complainant's vessels, and to enforce against the complainant, its officers, agents and servants, various pains and penalties, including fines and imprisonment, and various forfeitures of property provided by the Acts of Congress and regulations, and thus involve the complainant, its officers, agents and servants, in numerous suits and by such threats to prevent complainant, its employees and servants, from carrying out its contracts, and thus deprive the complainant of its business; all to the irreparable damage of complainant, and such in-

jury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainant would be involved in numerous suits if it were forced to bring an action at law to relieve its employees and property from such penalty and forfeiture.

30 Forasmuch, therefore, as complainant is without remedy in the premises, except in a court of equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled, it respectfully prays that the above named defendants and each of them be directed to make a full, true and perfect answer to this amended bill of complaint, but not under oath, an answer under oath being expressly waived, and that said defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainant, its officers, servants and employees, or any of them, or complainant's steamships, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General, and from arresting and prosecuting the complainant, its officers, agents, servants or employees, or any of them, and from refusing to issue to the complainant and/or its steamers, permits for clearance from the port of New York, or in any way interfering with the arrival or departure of the complainant's steamer, for or on account of any alleged violation by them, or any of them or on account of any alleged violation by them, or any of them, of the Eighteenth Amendment or the National Prohibition Act, on the ground or claim that the carriage or possession of said intoxicating liquors as aforesaid as sea stores for crew and passengers is contrary to law, or from molesting or otherwise interfering with the complainant in the peaceful possession of said intoxicating liquors on board such vessels as part of their sea stores.

31 Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause, whereby the defendants, their agents, servants, subordinates and employees and each and every one of them be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainant further prays that a writ of subpoena be issued herein directed to said defendants, commanding them on a day set to appear and answer the amended bill of complaint herein.

THE OCEANIC STEAM NAVIGATION  
COMPANY, LTD.,

By P. A. S. FRANKLIN,  
*Agent.*

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
*Solicitors for Complainant.*

27 William Street, New York City.

32

## SCHEDULE A.

(Copy.)

(T. D. 38218.)

## Sea Stores—Liquors.

Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited—Articles 106 and 107 of the Customs Regulations of 1915 as amended.

Treasury Department, December 11, 1919.

To Collectors of Customs and Others Concerned:

All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same Line or owner.

Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(Signed)

JOUETT SHOUSE,

*Assistant Secretary.*

(99623.)

## SCHEDULE B.

(Copy.)

(T. D. 38248.)

## Sea Stores.—Liquors.

Opinion of the Attorney General with respect to the practice under T. D. 38218 of sealing liquors listed as sea stores on vessels while in ports of the United States. Distinction made between American and foreign vessels. T. D. 38218 amended.

Treasury Department, January 27, 1926.

## To Collectors of Customs and Others Concerned:

Attention is invited to the appended copy of an opinion rendered by the Department by the Attorney-General with respect to the practice under T. D. 38218 of sealing liquors carried as sea stores on American vessels while in the ports of the United States, as indicated by the questions submitted to him.

Following the opinion of the Attorney-General the first paragraph of T. D. 38218 is hereby amended to read as follows:

All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew for meals or for any other purposes. All such liquors on foreign vessels should be sealed on arrival of the vessel in port, and such portions thereof released from time to time for use by the officers and crew.

The other provisions of T. D. 38218 are not affected by the  
34 Attorney-General's opinion, and therefore remain without modification.

(108377.)

JOUETT SHOUSE,  
*Assistant Secretary.*

STATE OF NEW YORK,  
*County of New York, ss:*

Philip A. S. Franklin, being duly sworn, says: I am Managing Agent of Oceanic Steam Navigation Company, Ltd. the complainant herein. I have read the foregoing amended bill of complaint and know the contents thereof and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and the grounds of my belief as to all matters in said bill of complaint not stated to be on my knowledge are an examination of documents and other papers in my possession relating to the subject matter

ter of this suit. The reason why this verification is not made by the complainant is that it is a foreign corporation.

P. A. S. FRANKLIN.

Sworn to before me this 16th day of October, 1922.

C. W. SMITH,

*Notary Public, Westchester Co., New York.*

Certificate filed New York County.

Clerk's No. 188. Reg. No. 4310.

Com. Expires March 30, 1924.

66 & 37 [Endorsed:] District Court of the United States, Southern District of New York. The Oceanic Steam Navigation Company, Limited, Complainant, vs. Andrew W. Mellon (Secretary of the Treasury of the United States, et al., Defendants. Copy. Amended Bill of Complaint. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

8 U. S. District Court, Southern District of New York.

E. 25/9.

THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED,  
Complainant,

versus

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Notice of Appearance and Demand.*

You will please take notice that I am retained by, and appear as attorney for, the Defendants in this action, and demand service of a copy of the complaint and all papers in this action upon me, at my office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours,

WM. HAYWARD,  
*United States Attorney,  
Attorney for Defendants.*

New York, Oct. 13, 1922.

To Burlingham, Veeder, Masten & Fearey, Esqs., 27 William Street, Attorney- for Plaintiff.

39 & 40 [Endorsed:] E. 25/9. U. S. District Court, Southern District of New York. The Oceanic Steam Navigation Company, Limited, Complainant, versus Andrew W. Mellon, Secretary of the Treasury of the U. S., et al., Defendants. Notice of Appearance. Wm. Hayward, United States Attorney, Attorney for Defendants. Due service of a copy of the within Notice is hereby admitted. Dated the 13 day of Oct., 1922. Plaintiff's Attorneys, To Burlingham, Veeder, Masten & Fearey, Esqs., Plaintiff's Attorneys, 27 William St.

41 In the District Court of the United States for the Southern District of New York.

THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED, Complainant  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States,  
Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Answer to Amended Bill of Complaint.*

Now come the defendants herein and in answer to the amended bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the amended bill of complaint herein and divers parts thereof be dismissed, and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.

2. The Court has no jurisdiction to grant the relief prayed for in any part thereof.

3. The bill does not present a cause of action in equity under the Constitution of the United States.

4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

42 6. It appears from the bill that the complainant has a plain adequate and complete remedy at law.

Second. In answer to the allegations set out in paragraph seventh of the complaint the defendants allege on information and belief that any difficulty which complainant might experience in obtaining ade

quate crews from among the nationals of countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread would be readily obviated by the payment of higher wages to said crews. Defendants are further informed and believe that many of the vessels of the American Merchant Marine carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages and that the said American vessels have never had the least difficulty in obtaining adequate crews from the nationals of such countries at the same wages paid to American crews.

Third. Defendants deny the allegations contained in paragraph eleventh of the amended bill of complaint that the ruling by the Attorney General referred to in said paragraph is and any regulations for the enforcement of such ruling are and will be unauthorized and void. Defendants further deny the allegation that such ruling and such regulations would violate complainant's rights under existing treaties between the United States, Great Britain and otherwise.

Fourth. Defendants deny the allegation contained in paragraph Twelfth of the amended bill of complaint that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is correct, it renders said Act unconstitutional and void for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional. The defendants allege on the other hand that it is well within the powers of Congress delegated to it by the Eighteenth Amendment to the Constitution of the United States to declare the possession of intoxicating liquor to be unlawful and that such legislative declaration contained in the National Prohibition Act is a valid exercise of the legislative power and has a reasonable relation to the enforcement of the constitutional mandate.

For a separate and distinct defense herein, defendants allege:

Fifth. Defendants re-allege and re-affirm as part of this separate and distinct defense each and every allegation contained in paragraphs First to Fourth above.

Sixth. Defendants are informed by their attorney and therefore allege that if the complainant is correct in its construction of the National Prohibition Act the implications involved are exceedingly serious and the claim of the complainant, if allowed, would carry with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States.

Seventh. Defendants are further informed and believe and therefore allege that for two years last past a large and profitable business has been carried on by divers persons with the object and result of



importing liquor into this country contrary to law; that the vessels used by such persons are vessels under foreign registry and  
 44 such vessels sail from foreign ports with clearance papers showing that they are bound for other foreign ports. That the actual destination of such vessels is not the port shown in their clearance papers but some point on the high seas near the coast of the United States from which its liquors are transferred to smaller boats which complete the smuggling and importation of the liquor into the United States. Up to the present time the vigilance of the customs officials in seizing such vessels when they came within the territorial limits of the United States has somewhat mitigated the evil of this traffic but if, as complainant contends it is only necessary to put liquors under lock and key to make such transportation legal and foreign vessels can sail our territorial waters at will with cargoes of liquor, the enforcement of the prohibition against the importation of liquors, already difficult, will become practically impossible.

Eighth. The rulings of the Secretary of the Treasury referred to in the bill of complaint have already been used as a cloak to hide smuggling operations and if the doctrine underlying such rulings is declared to be the law as claimed by complainant, defendants verily believe that its use as a cloak for such operations will greatly increase. As an instance of the use of such regulations to hide smuggling defendants allege that on or about January 15, 1920, the British passenger steamship "Harbinger" sailed from Halifax, N. S., for Havana, Cuba, carrying with her a large quantity of intoxicating liquors listed as sea stores. The said vessel came into the port of Portland, Maine, alleging a shortage of coal, and there her liquor was sealed under customs seals. Her master protested her innocence and claimed the right as a foreign vessel to transport intoxicating  
 45 liquors as sea stores under seal within the territorial waters of the United States. This right was accorded her under the Treasury rulings until recently in force and on which complainant has relied until now. Being under suspicion, however, the "Harbinger" was convoyed by the coastguard cutter "Ossipec" to Cape Ann whence she entered the port of Boston and thence proceeded without convoy to the neighborhood of New York where she was met by the coastguard cutter "Gresham" which convoyed her to New York. On January 26th, she was convoyed down New York Bay by the coastguard cutter "Manhattan" to Dunham Shipyard, Staten Island. There she remained under customs surveillance until February 6th when the customs seals on the liquors were broken by the crew and an attempt was made to import them into the United States. When such attempt was made the crew of said vessel were arrested. Two have plead guilty to a violation of the Prohibition Act and the vessel has been libelled by the Government. After the crew were arrested it became evident that the journey of this vessel down the coast of the United States was not, as alleged and as appeared, because of insufficient coal-carrying space but for the purpose of finding purchasers of the liquor carried as sea stores.

Ninth. Defendants further allege that under the regulations of the Secretary of the Treasury referred to in the complaint herein, customs officers have made no physical inventory of the stores of liquors on any foreign ships either upon their arrival in the ports of the United States or upon their leaving such ports. Permission has been given to remove certain of the liquors under seal for the purposes of rations given to the crews, but no record is kept of the amount of liquor which actually leaves United States ports on foreign vessels, nor is any inventory returned by such foreign vessels of the amount of liquors actually found when seals are broken by the ship's agents after leaving port.

Tenth. Defendants are informed and verily believe that the complainant makes large profits from the sale of intoxicating liquors on the high seas, such profits amounting to many thousand dollars per annum and further allege that loss of such profit is the only definitely ascertainable loss which the complainant will suffer if the National Prohibition Act as interpreted by the ruling of the Attorney General is given full force and effect.

Eleventh. Defendants further allege on information and belief that the sale of intoxicating liquors on the high seas by vessels carrying the American flag ceased with the issuance of the ruling of the Attorney General and is not now carried on. And defendants verily believe that if vessels of foreign registry are by the injunction of this Court facilitated in the sale of liquor on the high seas by being allowed to transport liquor within the territorial waters of the United States, the resultant damage to the American merchant marine will be great and irreparable. Not only will ships of the American merchant marine suffer the loss of revenue which they have hitherto enjoyed from the sale of intoxicating liquors on the high seas and which ships of foreign nations will continue to enjoy if the prayer of the complainant herein is granted, but defendants believe that a large number of passengers who would otherwise travel on American ships and who would travel on American ships if both American ships and foreign ships were placed in the same position in regard to the sale of liquor on the high seas, will, if foreign ships are placed in an advantageous position in this regard travel on foreign ships and the American ships will lose a large amount of revenue thereby. Defendants are informed and verily believe that the loss of such revenue from the sales of liquor and from passage money in case of a differential treatment giving preference to foreign ships over American ships in the matter of transportation of intoxicating liquors within the territorial waters of the United States, will be sufficient to make it impossible for the American merchant marine to compete profitably with ships of foreign registry. The majority of the American passengers liners operating in the North Atlantic trade, in competition with complainant's and other foreign vessels are owned and operated directly by the United States Government. Any loss of revenue by reason of a differential treatment favorable to foreign ships will fall directly on the United States Government and its tax-payers.

Wherefore, defendant prays that the amended bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,  
*United States Attorney for the Southern District  
 of New York, Attorney for Defendants.*

Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

48 & 49 [Endorsed:] District Court of the United States, Southern District of New York. The Oceanic Steam Navigation Company, Limited, Complainant, versus Andrew W. Mellon, Secretary of the Treasury of the U. S., et al., Defendants. Answer to Amended Bill of Complaint. Wm. Hayward, U. S. Attorney, Attorney for defendants, Borough of Manhattan, New York City.

50 In the District Court of the United States for the Southern District of New York.

THE OCEANIC STEAM NAVIGATION COMPANY, LTD., Complainant  
 against

ANDREW W. MELLON, Secretary of the Treasury of the United States,  
 Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Restraining Order.*

An order having been signed herein on October 13, 1922, directing the defendants to show cause on October 17, 1922, why an order should not be made restraining the defendants, their successors, agents, servants and subordinates during the pendency of this suit from seizing, disturbing, removing or in any way interfering with wines, liquors or other intoxicating beverages on board the complainant's ships as sea stores or medicines, and restraining the defendants in other respects therein specifically set forth, and providing that until the hearing of the said motion under said order to show cause the defendants, their successors, agents, servants, subordinates, and each of them, be restrained from seizing, disturbing, removing or in any way interfering with wines, liquors or other intoxicating beverages on board the complainant's ships as sea stores or medicines as more particularly set forth in the bill of complaint herein; and restraining the defendants in other respects more specifically set forth in said order to show cause; and said motion having come on to be heard and decision thereon having been reserved, it is

51 Ordered that until the determination of said motion under said order to show cause the defendants, their successors, agents, servants, subordinates, and each of them, be, and

hereby are, restrained from seizing, disturbing, removing or in any way interfering with wines, liquors or other intoxicating beverages on board complainant's ships as sea stores or medicines, as more particularly set forth in the bill of complaint herein; from seizing, disturbing or in any way interfering with the complainant's ships by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages as ships stores, as more particularly set forth in the bill of complaint, and from enforcing, or attempting to enforce, or causing to be enforced, against the complainant, its officers, agents or servants, or any of them, or any of its steamships, any of the pains, penalties or forfeitures, provided in and by the so-called National Prohibition Act enacted by Congress pursuant to the Eighteenth Amendment to the Federal Constitution; and from refusing to issue to complainant or its steamers permits for clearance from the port of New York, or in any way interfering with the arrival or departure of any of the complainant's steamers by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages, as said ship's stores, as more particularly set forth in the bill of complaint herein; and sufficient reason appearing it is further

Ordered that service of this order on the United States Attorney for the Southern District of New York be sufficient.

LEARNED HAND,

U. S. D. J.

Dated, New York, Oct. 17, 1922.

52 & 53 [Endorsed:] District Court of the United States, Southern District of New York. The Oceanic Steam Navigation Company Ltd., Complainant, vs. Andrew W. Mellon and others Defendants. Copy. Order. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

54 United States District Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HENDERSON BROTHERS, LTD.),

against

ANDREW W. MELLON, Secretary of the Treasury of the United States, et al.,

And Ten Other Cases.

*Opinion.*

Oct. 23, 1922.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decrees upon the answers. The pleadings have been so drawn on both sides as to raise the merits

of the controversy, and it is not necessary to set them forth in detail.

The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and liquors as part of their sea-stores. This was done with the consent of the public authorities who promulgated regulations recognizing the practice, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an opinion at that time given by the Attorney General, was that, as per-  
 55 of the ship's stores, these wines and liquors, if sealed and kept on board, were not to be regarded as brought within the country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where the peace of the sovereign is at stake. Later the permission so given was further extended to allow the ships to dispense to their crews their customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of *Grogan v. Walker*, and *Anchor Line v. Aldridge*, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying in and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed to execute the law in accordance with this opinion, and this created the situation out of which these bills arise.

The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in Europe so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal and carried out again, only for the entertainment of passengers barking from the United States. Besides the wines and liquors used the steamers carry a stock for the use of their crews. In the

56 case of the French, Italian and Belgian ships the law of the flag requires them to supply a ration of wine and in these cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign lines; they have freely sold their wines and liquors at sea at

brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some cases the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the Zone Officer, but the Collector of the Port of New York and the local Prohibition Director are defendants in all.

#### Appearances:

Hon. Van Vechten Veeder, for Oceanic Steam Navigation Co., Ltd., Liverpool, Brazil & River Plate Steam Navigation Co., Ltd., United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., the Netherlands American Steamship Co., (Holland America Line) and Pacific Steam Navigation Company.

Lucius H. Beers, Esq., for The Cunard Steamship Co., Ltd., and Anchor Line (Henderson Brothers).

Joseph P. Nolan, Esq., for Compagnie Generale Transatlantique.

Reid L. Carr, Esq., for United American Lines, et al.

Cleatus Keating, Esq., and John M. Woolsey, Esq., for International Mercantile Marine and International Navigation Co., Ltd.

William Hayward, Esq., U. S. Atty., and John Holley Clark, Esq., Asst. U. S. Atty., for Defts. in all cases.

#### LEARNED HAND, D. J.:

It is conceded, and indeed could not be disputed, after *Grogan v. Walker* and *Anchor Line v. Aldridge*, decided May 15, 1922, that, had the liquors here in question been a part of the ship's cargo, the bills would not lie. It makes no difference that they were not to be unloaded while carried within territory of the United States; the carriage would be transportation none the less. But because they are part of the ship's stores, in the sense that that term is generally understood, the plaintiffs argue that they do not fall within the same rule. This argument rests upon two alternative premises, first, that "transportation" involves a place where, and a person to whom, the goods are to be delivered, and second, that a ship's stores have by long custom been treated as a part of the "furniture." *Brough v. Whitmore*, 4 Term R. 206, or "appurtenances," *The Dundee*, 1 Lagg. Adm. 109, of the ship, which do not without particular mention become subject to the municipal law of the ports into which she enters, any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I do not see how that would help the plaintiffs. These liquors are carried for delivery at sea to the passengers and crew, and when so delivered their transportation ends. There appears to me no significant distinction in the fact that the place of delivery is the ship itself. The passengers, and for that matter, the crew, are not the same person as the owner, and if the passage of title or possession has anything to do with the matter, the title to, and possession of, the bottle or the dram, passes when it is handed to its consumer. The

carriage within the limits of the Port of New York is a part of a transit whose purpose from the beginning is that very delivery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to search out and coal at sea friendly cruisers during war, as happened in 1914.

Therefore, I might admit the plaintiffs' interpretation of the word, if it were necessary. Nevertheless, it seems to me at best very doubtful whether it carries with it any such limitation. The cases on which the plaintiffs rely come only to this, that the jurisdiction of the United States under the interstate commerce clause does not terminate until delivery after a transit across State lines, *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196, *Rhodes v. Iowa*, 170 U. S. 412, *Louisville & Nashville R. R. v. Cook Brewing Co.*, 223 U. S. 70, *Dan- ciger v. Cooley*, 248 U. S. 319. From this it does not follow that the term, "transportation," as used in this statute, implies delivery to another than the person who carries the liquors. Suppose, for example, a parcel of liquor, made after the Amendment, and carried off to be laid away in a cache. There can be no question, I believe, that two separate crimes would be committed, "manufacture" and "transportation."

Nor does it seem to me that the thirteenth and fourteenth sections of Title II of the Prohibition Act, help the plaintiffs. Under these carriers are required to mark the consignor's and consignee's names on the outside of all packages. But it does not follow that a regulation like this of one kind of transportation imputes to the word itself any of the conditions which it enacts. In common use to transport means to carry about, and I see no reason why it should mean less in Section three. The law clearly intended by immobilizing liquor to make surreptitious traffic in it impossible, and its policy would as well cover movements which might be incidental to, as those which immediately terminated in, a delivery to someone else. The case of *Street v. Lincoln Safe Deposit Company*, 254 U. S. 88, did not decide anything to the contrary; it turned upon the fact that the possession of the liquor in the leased room and in the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as *Street* had, for the possession of the liquor. I conclude therefore that the carriage in question is "transportation."

The first point being thus disposed of, I come to the second. It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States, (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they must be manifested and may not be excessive in quantity, as such they are



not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbade generally the transportation of liquors, it must be read in the light of this statute and the long usage under it, and that what is not within the United States for the purposes of customs ought not to be so for purposes of prohibition. In addition they urge that under the maritime law it is held that for most purposes sea-stores will not be treated as a part of the ship herself. If she is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and least of all a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to these, *Brown v. Duchesne*, 19 How. 183, *Taylor v. U. S.*, 207 U. S. 120, *Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122. Nevertheless, everyone must agree that the question is no more than one of interpretation, for in the cases at bar Congress certainly might, if it chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

*Grogan v. Walker*, supra, and *Anchor Line v. Aldridge*, supra, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thorough-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the Amendment, and its very want of particularity is a good index that it meant to cover what it could. For this reason it is to be distinguished from earlier local acts of the same kind, as for example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force.

Assuming that the customs laws give a positive right to enter ship stores into the United States, a position in itself very doubtful, since in form it only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the promise and not the promise, of the nation. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

62 However, the motives for positively assuming that such stores must be considered as included within Section 3233 do not appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legislative motives is speculative, but that vice, if it be one, is of the plaintiffs' making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitation on that meaning, because of the supposed intent of Congress. Since, therefore, I am asked to have recourse to implications, I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises.

In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan v. Walker*, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the law runs for all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and

63 kept here. Ignoring for the moment the crews, all of the stocks are avowedly intended for the consumption of the persons who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside of Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparation within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I

scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law. The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question; it must be enough for him that each is forbidden.

64 It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the section covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crews' rations stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later.

Cases like *Brown v. Duchesne*, supra, *Taylor v. U. S.*, supra, and *Scharrenberg v. U. S.*, supra, are all indeed in point. They illustrate the extent to which seamen and slips are regarded as enclaves from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning of Section three accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is *sui generis*, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages. It is true that the prayers for relief do include so much, but prayers without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs than anything I may think about the law. The power under 66 the Seventy-fourth Rule to grant such an order is undoubted, notwithstanding a dismissal of the bill, *Merriman River Savings Bank v. City of Clay Center*, 219 U. S. 527, *Stafford v. King*, 90 Fed. R. 136 (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he holds his decree. Like all such matters, it depends upon a balance between the two, and I must now assume that the chances of success are not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some nicety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far as the loss of the liquors themselves is concerned the damage cannot be said to be irreparable. These must be condemned before they can be forfeited, and in the present state of the calendars the cases at bar will be finally determined long before such libels can be tried. If I am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the local acquiescence of the authorities in the practices here in question will

67 moderate the ultimate penalty of confiscation; I must assume that the plaintiffs will receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as part of the crew's ration. If the ration is cut off some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good

deal of trouble and expense in securing seamen who will sign on upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages to stay the enforcement of the law against stocks of wine and liquor necessary for crew's rations, if honestly kept and dispensed for that purpose alone.

As to the maintenance of passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing inter se and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is easy to say, if one does not take seriously the opinion behind the Amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury which no judge has the right to ignore. The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is.

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge, the plaintiffs have no case. Therefore I will go no further than to issue an injunction against interfering with the carriage of a stock necessary for the crews' rations on the east-bound voyage. The plaintiffs must each give a bond in the sum of twenty-five thousand dollars, conditional against the use of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal, if the same be taken at once. Settle orders on notice.

October 23, 1922.

LEARNED HAND,  
D. J.

69 At a Stated Term of the District Court of the United States for the Southern District of New York held in the Court Rooms thereof, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 24th day of October, 1922.

Present: Hon. Learned Hand, District Judge.

THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED, Complainant  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States  
Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Final Decree.*

Oct. 24, 1922.

This cause came on to be heard at this term upon motions by the defendants to dismiss the amended bill of complaint and by the plaintiffs for a final decree in their favor on the pleadings, and was argued by counsel; and thereupon, upon consideration thereof

70 it was

Ordered, adjudged and decreed that the amended bill of complaint herein be dismissed and defendants have judgment against the complainants for their costs to be taxed, and it is further

Ordered, adjudged and decreed that until final hearing of the cause caused in the Supreme Court of the United States and the entry of an order or decree on the mandate of that Court, the defendants, their servants, agents and subordinates, be and they hereby are stayed and restrained from seizing or interfering with the possession or carriage by complainants herein (1) of all stocks of liquors on vessels sailing westward on or before October twenty-seventh, provided that such stocks are not taken out of the United States unless authorized by the Secretary of the Treasury or other authority; (2) of a stock of liquors customary for the rations of the crews of complainants' vessels upon each east bound voyage, upon the filing of a bond in the penal sum of twenty-five thousand dollars (\$25,000), conditioned against the gift, issuance or sale of such stock of liquors by complainants otherwise than as crews' rations to the crews of complainants' vessels, and it is further

Ordered, adjudged and decreed that if complainants shall fail to take an appeal herein to the Supreme Court of the United States within five days from the entry hereof, or to move for preference on the first motion day of the Supreme Court, the defendants may move herein to vacate the injunction granted above

LEARNED HAND,  
U. S. D. J.

72 In the District Court of the United States for the Southern District of New York.

THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED,  
Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Petition for Appeal.*

The complainant above named, The Oceanic Steam Navigation Company, Ltd., conceiving itself aggrieved by the final judgment and decree entered herein October 1922, does hereby appeal from said final judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, from which it appears that this cause is appealable directly from this Court to the said Supreme Court under Section 238 of the Judicial Code, and said The Oceanic Steam Navigation Company, Ltd. prays that it be allowed this appeal and that a transcript of the record papers and proceedings upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

The foregoing appeal is hereby allowed as prayed for.

LEARNED HAND,

*U. S. D. J.*

To Hon. William Hayward, United States Attorney; Alexander Lehrist, Jr., Esq., Clerk, United States District Court, Southern District of New York.

3 & 74 [Endorsed:] District Court of the United States, Southern District of New York. The Oceanic Steam Navigation Company, Limited, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Copy petition for Appeal. Burlingham, Veeder, Masten & Fearey, Processors for Complainant, 27 William Street, Borough of Manhattan, New York City.



75 In the District Court of the United States for the Southern  
District of New York.

THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED,  
Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United  
States; Henry C. Stuart, Acting Collector of the Customs for the  
Port of New York, and Ralph A. Day, Federal Prohibition In-  
spector for the State of New York, Defendants.

*Assignment of Errors.*

The complainant hereby assigns error in the final judgment or  
decree of the District Court herein entered October 24, 1922, in the  
following respects:

First. The Court erred in dismissing the bill of complaint herein.

Second. The Court erred in denying the petition for an injunction.

Third. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States prohibits a foreign ship from keeping on board while on the territorial waters of the United States intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fourth. The Court erred in holding that the National Prohibition Act prohibits a foreign ship from keeping on board, while on the territorial waters of the United States, intoxicating beverages constituting part of the customary sea stores of such ship law-

76 fully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the crew as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Sixth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibited a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the passengers as part of their customary rations by the law

of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Seventh. That the National Prohibition Act as construed and applied by the District Court is unconstitutional and void because enforcement thereof with respect to sea stores on the complainant's vessels would deprive the complainant of its property and subject it to penalties without due process of law.

Eighth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the third and fourth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Ninth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the Fifth and Sixth Assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Tenth. The Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverages in the circumstances mentioned in the Third, Fourth, Fifth and Sixth assignments of error is prohibited by the Eighteenth Amendment and the National Prohibition Act.

Eleventh. The Court erred in refusing to hold that the interpretation of the National Prohibition Act mentioned in the Ninth assignment of error was unconstitutional and invalid and not within the powers conferred by Congress by the Constitution.

Wherefore, complainant-appellant prays that said decree or judgment of the United States District Court for the Southern District of New York be reversed and an injunction granted the complainant as prayed for in the amended bill of complaint herein & for such other and further relief as to the court may seem just & proper.

Dated New York, October 24, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

[Endorsed:] District Court of the United States, Southern District of New York. The Oceanic Steam Navigation Company, Limited, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., defendants. Copy. Assignment of Errors. Burlingham, Veeder, Masten & Fearey, Proctors for Complainant, 27 William Street, Borough of Manhattan, New York City.

80

*Citation on Appeal.*

By the Honorable Learned Hand, One of the United States District Judges for the Southern District of New York, in the Second Circuit, to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the Port of New York, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court to be holden at Washington, in the District of Columbia, on the 20th day of November, 1922, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein the Oceanic Steam Navigation Company, Ltd., is complainant and you are defendants to show cause, if any there be, why the decree in said cause mentioned should not be corrected and why special justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 24th day of October, in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

LEARNED HAND,

*United States District Judge for the Southern  
District of New York, in the Second Circuit.*

81 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Citation.

82 In the District Court of the United States for the Southern District of New York.

THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED,  
Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Stipulation.*

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of said District Court in the above entitled matter as agreed on by the parties.

Dated New York, October 24, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

WILLIAM HAYWARD,

*Attorney for Defendants.*

83 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

THE OCEANIC STEAM NAVIGATION CO., LIMITED, Complainant,  
vs.

ANDREW W. MELLON, Secretary of the Treasury, et al., Defendants.

*Clerk's Certificate.*

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 24th day of October, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of the District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,  
*Clerk.*

Endorsed on cover: File No. 29,210. S. New York D. C. U. S. Term No. 600. The Oceanic Steam Navigation Company, Ltd., Appellant, vs. Andrew W. Mellon, Secretary of the Treasury of the United States, et al. Filed October 25th, 1922. File No. 29,210.

(7601)

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 661.

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INTERNATIONAL NAVIGATION COMPANY, LIMITED,  
APPELLANT,

vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, *ET AL.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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FILED OCTOBER 25, 1922.

(29,211)

(29,211)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 661.

INTERNATIONAL NAVIGATION COMPANY, LIMITED,  
APPELLANT,

vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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1 Office Copy.

Kirlin, Woolsey, Campbell, Hickox & Keating, 27 William Street,  
New York.

In the District Court of the United States for the Southern District  
of New York.

In Equity.

E. 25/16.

INTERNATIONAL NAVIGATION COMPANY, LIMITED, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States.  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for  
the State of New York, and John D. Appleby, Chief Zone Officers,  
Defendants.

To the Honorable the Judges of the District Court of the United  
States for the Southern District of New York, Sitting in Equity:

The Complainant, International Navigation Company, Limited,  
brings this its Bill of Complaint against the above-named defendants  
and respectfully shows as follows:

I. Complainant International Navigation Company, Limited, is  
a corporation duly organized and existing under the laws of the  
United Kingdom of Great Britain and Ireland, with its principal  
place of business in Liverpool, England.

2 II. Complainant is informed and verily believes and there-  
fore alleges on information and belief:

The defendant Andrew W. Mellon is Secretary of the Treasury  
of the United States, and he is, and his subordinates are, by law  
charged with the duty of enforcing the terms and provisions of the  
Acts of Congress passed under the authority of the Eighteenth  
Amendment to the Constitution of the United States and the mak-  
ing of Regulations promulgated for the purpose of enforcing such  
Acts of Congress.

The defendant Henry C. Stuart is a subordinate of said Secretary  
of the Treasury and is Acting Collector of Customs for the Port of  
New York, and said defendant is by law charged with the duty of  
enforcing the terms and provisions of the Acts of Congress and the  
regulations and decisions of the Secretary of the Treasury, which  
from time to time may be promulgated, within that portion of the  
Port of New York wherein the complainant desires to bring its vessels  
equipped with certain sea stores as hereinafter set forth.

The defendant Ralph A. Day is a subordinate of the said Secretary of the Treasury and is the Prohibition Director for the State of New York, which State embraces that portion of the Port of New York wherein the complainant desires to bring its vessels equipped as aforesaid, and said defendant is by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under authority of the Eighteenth Amendment to the Constitution of the United States and regulations of Executive departments of the United States Government promulgated for the enforcement of such Acts of Congress.

The defendant John D. Appleby is a subordinate of the said Secretary of the Treasury, and is the Chief Zone Enforcement Officer for this Zone, and said defendant is by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under authority of the Eighteenth Amendment to the Constitution of the United States and regulations of executive departments of the United States Government promulgated for the enforcement of such Acts of Congress.

III. This is a suit of a civil nature, arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three thousand dollars (\$3,000) in value, exclusive of interest and costs.

IV. Complainant was incorporated under the laws of the United Kingdom of Great Britain and Ireland for the purpose of carrying on a steamship business and for many years has been engaged in the business of transporting, as a common carrier, passengers and cargo for hire on the high seas, and, in transacting such business, the complainant maintains and operates fleets of steamships which ply between ports of Europe and the United States.

All of said steamships are British vessels built and registered in Great Britain and not in the United States, and fly the British flag. Complainant owns four passenger and cargo steamers of a total gross tonnage of about 65,000. Said steamers are worth many millions of dollars, and any interruption of their regular services causes great loss and damage to complainant, the extent of which it is impossible to estimate. Complainant occupies in the City of New York Piers Nos. 59 and 60, North River, which are leased from the City of New York. The compensation received by complainant for the carrying of passengers amounts in the aggregate to many thousands of dollars annually.

V. The crews operating complainant's vessels, including those carrying passengers and cargo and those carrying cargo alone, are made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic liquors for beverage purposes is not prohibited, by whose customs the use of alcoholic liquors for beverage purposes is so widespread that complainant would experience the greatest difficulty in obtaining adequate crews to operate their vessels running to the United States if they were prohibited from furnishing a safe and reasonable amount of liquor to members of the crews.

VI. A considerable portion of passengers traveling to and from the United States by complainant's ships consists of through passengers from one foreign country to another by way of the United States. As these passengers are largely foreigners, accustomed to the use of wines and liquors with their meals, if complainant is prevented from furnishing wines and liquors to them while on the high seas, they will travel by steamers of other lines not touching at United States ports.

VII. The prohibition of the use of alcoholic liquors on complainant's vessels as sea stores, for the reasonable use of crew and passengers, would cause your complainant great pecuniary loss by reason of the difficulty of obtaining crews, and would cause an annual loss of receipts from passenger business of many thousands of dollars a year, and will involve irreparable damage to your complainant, in that it will destroy a considerable part of its business and render a considerable part of its equipment useless and cause a loss of its profits.

VIII. It has at all times heretofore been the practice of complainant's vessels, in common with other British vessels, to carry as part of their sea stores certain wines, liquors and other intoxicating beverages for consumption by the vessel's passengers and crew, such sea stores, including such wines, liquors and other intoxicating beverages, being the property of the complainant and on board solely for such consumption on board and not for transportation or landing in the United States or elsewhere, and upon arrival of any vessel in the United States an accurate list of all such sea stores, including such wines, liquors and other intoxicating beverages, being furnished to the United States authorities.

Since the adoption of the so-called National Prohibition Act of October 28, 1919, complainant's ships have been permitted freely to come and go in the port of New York and other ports and territorial waters of the United States with such sea stores, including such wines, liquors and other intoxicating beverages on board, under regulations of the Secretary of the Treasury, providing in substance that the said wines, liquors and other intoxicating beverages should, while any vessel is within the jurisdiction of the United States, be placed under seal of the United States customs officials and be under the exclusive control of such officials. The complainant has at all times been ready and willing to conform to, and has conformed, to such regulations, and upon arrival of any of complainant's vessels within the jurisdiction of the United States each vessel has immediately been boarded by the United States customs officials, who thereupon placed such wines, liquors and other intoxicating beverages under seal and assumed exclusive control thereof until the same were unsealed by such customs officials upon the vessel's again leaving the jurisdiction of the United States. By British law British vessels are required to maintain on board for medicinal purposes a certain quantity of wines and liquors. By laws of Belgium, to which country the vessels mentioned herein

customarily trade, the vessels are required by law to have 20 bottles of claret for every 100 emigrants.

IX. All of the alcoholic liquors carried as such sea stores on complainant's vessels are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for sea stores is taken on board complainant's vessels at European ports, and no part of such liquor is intended to be landed in the United States.

X. On or about October 5, 1922, as complainant is informed and believes, the Attorney General of the United States transmitted his opinion to the Secretary of the Treasury in which, among other things, he stated that the sale, transportation or possession of intoxicating liquors for beverage purposes on foreign vessels while in the territorial waters of the United States is prohibited by said National Prohibition Act. Thereafter, the President of the United States directed that said National Prohibition Act be enforced in accordance with said opinion of the Attorney General, and directed the Secretary of the Treasury to proceed to the formulation of regulations for the enforcement of said law in accordance with said opinion of the Attorney General with respect to foreign ships.

Complainant is informed and believes that the defendant, through the Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States and threaten to enforce said Prohibition Act as so interpreted by the Attorney General. Complainant's vessels will shortly from time to time thereafter be sailing from foreign ports for the United States, and, unless restrained, the defendants intend, as complainant is informed and believes, upon arrival of said vessels within the United States, to seize all wines, liquors and other intoxicating beverages on board and included in the sea stores of said vessels, and threaten also to seize the vessels themselves as being in violation of said National Prohibition Act and subject to the penalties herein provided; and any such seizure of said wines, liquors and other intoxicating beverages, constituting part of said sea stores of said vessels for use and consumption of passengers and crews as aforesaid, or seizure of said vessels themselves, will disrupt the sailings of complainant's vessels, prevent the performance of obligations incurred in respect thereof, deprive complainant of a large volume of patronage, and otherwise cause loss, damage and difficulties to the complainant to its great and irreparable loss and injury.

XI. Complainant is advised by counsel, and verily believes, that the aforesaid ruling by the Attorney General with respect to foreign ships carrying intoxicating beverage liquors as ship's stores for crew or passengers as aforesaid, and any regulations formulated by the Secretary of the Treasury for the enforcement of such ruling, are and will be unauthorized and void because

neither the Eighteenth Amendment nor the National Prohibition Act prohibit the carriage of such liquors as such sea stores for crew and passengers as aforesaid, and an interference with the carriage of such sea stores, would, therefore, violate complainant's rights under the law and under existing treaties between the United States and Great Britain and otherwise.

XII. Complainant is advised by counsel, and verily believes, that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders said Act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession any-  
11 thing more than a presumption of a violation of the said Act, it is unconstitutional.

XIII. Complainant alleges that the defendant Andrew W. Mellon, or his subordinates, are preparing regulations and that pursuant to said opinion of the Attorney General or such regulations, the defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart, and Ralph A. Day, are threatening, notwithstanding the fact that the interpretation of the Act of Congress, known as the National Prohibition Act, by the Attorney General is erroneous, unauthorized and void, and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said National Prohibition Act, if it purports to prohibit the carriage of said alcoholic beverages as sea stores for crew and passengers, is unconstitutional and void for the reasons hereinabove stated, to seize said alcoholic liquors now constituting sea stores on complainant's vessels, and to enforce against the complainant, its officers, agents and servants, various pains and penalties, including fines and imprisonment and various forfeitures of property provided by the Acts of  
12 Congress and regulations, and thus involve the complainant, its officers, agents and servants, in numerous suits and by such threats to prevent complainant, its employes and servants, from carrying out its contracts, and thus deprive the complainant of its business; all to the irreparable damage of the complainant, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainant would be involved in numerous suits if it were forced to bring an action at law to relieve its employes and property from such penalties and forfeiture.

Forasmuch, therefore, as complainant is without remedy in the premises, except in a court of equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled it respectfully prays that the above named defendants and each of them be directed to make a full, true and perfect answer to this Bill of Complaint, but not under oath, an answer under oath being ex-

pressly waived, and that said defendants, their agents, servants, subordinates and employes, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainant.

13 its officers, servants, and employes, or any of them, or complainant's steamships, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General, and from arresting and prosecuting the complainant, its officers, agents, servants or employes, or any of them, and from refusing to issue to the complainant and/or its steamers permits for clearance from the port of New York, or in any way interfering with the arrival or departure of the complainant's steamers, for or on account of any alleged violation by them, or any of them, or on account of any alleged violation by them, or any of them, of the Eighteenth Amendment or the National Prohibition Act, on the ground or claim that the carriage or possession of said intoxicating liquors as aforesaid as sea stores for crew and passengers is contrary to law; or from molesting or otherwise interfering with the complainant in the peaceful possession of said intoxicating liquors on board such vessels as part of their sea stores.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and

14 decision of this cause whereby the defendants, their agents, servants, subordinates and employes and each and every one of them be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainant further prays that a writ of subpoena be issued herein directed to said defendants, commanding them on a day set, to appear and answer the Bill of Complaint herein.

INTERNATIONAL NAVIGATION COMPANY,  
LIMITED,

By P. A. S. FRANKLIN,  
*Agent.*

KIRLIN, WOOLSEY, CAMPBELL, HICKOX &  
KEATING,

*Solicitors for Complainant.*

27 William Street, Borough of Manhattan, New York City.

15 & 16 STATE OF NEW YORK,  
*County of New York, ss:*

Philip A. S. Franklin, being duly sworn, says:

I am Managing Agent of International Navigation Company, Ltd., the complainant herein. The foregoing Bill of Complaint is true to the best of my knowledge, information and belief. The sources of my knowledge and the grounds of my belief as to all matters in said bill of complaint not stated to be on my knowledge are an examination

tion of documents and other papers in my possession relating to the subject matter of this suit. The reason why this verification is not made by the complainant is that it is a foreign corporation.

P. A. S. FRANKLIN.

Sworn to before me this 16 day of October, 1922.

[SEAL.]

FRANK A. BERNERS,  
*Notary Public, Bronx County.*

Certificate filed in New York County.

Certificate filed in Kings County.

17 [Endorsed:] United States District Court, Southern Dist. of N. Y. International Navigation Company, Limited, Complainant, against Andrew W. Mellon, Secretary of the Treasury, etc., et al., Defendants. Bill of Complaint. Kirlin, Woolsey, Campbell, Hickox & Keating, Solicitors for Complainants, 27 William Street, New York, N. Y.

18 Office Copy.

Kirlin, Woolsey, Campbell, Hickox & Keating, 27 William Street, New York.

*Equity Subpœna.*

The President of the United States of America to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officers, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by International Navigation Company, Limited, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 16th day of October, in the year One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

ALEX GILCHRIST, JR.,

*Clerk.*

KIRLIN, WOOLSEY, CAMPBELL,  
HICKOX & KEATING,

*Complainant's Sol'rs.*

7



The Defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX GILCHRIST, JR.,  
Clerk.

19

Office Copy.

Kirlin, Woolsey, Campbell, Hickox & Keating, 27 William Street,  
New York.

U. S. District Court, Southern District of New York.

E. 25/16.

INTERNATIONAL NAVIGATION COMPANY, LIMITED,

versus

ANDREW W. MELLON, Secretary of the Treasury of the U. S., et al.

*Notice of Appearance and Demand.*

You will please take notice that I am retained by, and appear as Solicitor for, the Defendants in this action, and demand service of a copy of the complaint and all papers in this action upon me, at my office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours,

WM. HAYWARD,  
United States Attorney,  
Attorney for Defendants.

New York, Oct. 16, 1922.

To Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for  
Plaintiff.

20 United States District Court, Southern District of New York.

In Equity.

E. 25/16.

INTERNATIONAL NAVIGATION COMPANY, LIMITED, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officers, Defendants.

*Answer to Bill of Complaint.*

Now come the defendants herein and in answer to the bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the bill of complaint herein and divers parts thereof be dismissed, and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.

2. The Court has no jurisdiction to grant the relief prayed for or any part thereof.

3. The bill does not present a cause of action in equity under the Constitution of the United States.

4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

6. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

21 Second. In answer to the allegations set out in paragraph VII of the complaint the defendants allege on information and belief that any difficulty which complainant might experience in obtaining adequate crews from among the nationals of countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread would be readily obviated by the payment of higher wages to said crews. Defendants are further informed and believe that many of the vessels of the American merchant marine

carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages and that the said American vessels have never had the least difficulty in obtaining adequate crews from the nationals of such countries at the same wages paid to American crews.

Third. Defendants deny the allegations contained in paragraph eleventh of the amended bill of complaint that the ruling by the Attorney General referred to in said paragraph is and any regulations for the enforcement of such ruling are and will be unauthorized and void. Defendants further deny the allegation that such ruling and such regulations would violate complainant's rights under existing treaties between the United States, Great Britain and otherwise.

Fourth. Defendants deny the allegation contained in paragraph twelfth of the amended bill of complaint that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is correct, it renders said Act unconstitutional and void for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act

22 purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional.

The defendants allege on the other hand that it is well within the powers of Congress delegated to it by the Eighteenth Amendment to the Constitution of the United States to declare the possession of intoxicating liquor to be unlawful and that such legislative declaration contained in the National Prohibition Act is a valid exercise of the legislative power and has a reasonable relation to the enforcement of the constitutional mandate.

For a separate and distinct defense herein, defendants allege:

Fifth. Defendants re-allege and re-affirm as part of this separate and distinct defense each and every allegation contained in paragraphs First to Fourth above.

Sixth. Defendants are informed by their attorney and therefore allege that if the complainant is correct in its construction of the National Prohibition Act the implications involved are exceedingly serious and the claim of the complainant, if allowed, would carry with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States.

Seventh. Defendants are further informed and believe and therefore allege that for two years last past a large and profitable business has been carried on by divers persons with the object and result of importing liquor into this country contrary to law; that the vessels used by such persons are vessels under foreign registry and such

23 vessels sail from foreign ports with clearance papers showing that they are bound for other foreign ports. The actual destination of such vessels is not the port shown in their clearance

papers but some point on the high seas near the coast of the United States from which its liquors are transferred to smaller boats which complete the smuggling and importation of the liquor into the United States. Up to the present time the vigilance of the customs officials in seizing such vessels when they came within the territorial limits of the United States has somewhat mitigated the evils of this traffic but if, as complainant contends it is only necessary to put liquors under lock and key to make such transportation legal and foreign vessels can sail our territorial waters at will with cargoes of liquor, the enforcement of the prohibition against the importation of liquors, already difficult, will become practically impossible.

Eighth. The rulings of the Secretary of the Treasury referred to in the bill of complaint have already been used as a cloak to hide smuggling operations and if the doctrine underlying such rulings is declared to be the law as claimed by complainant, defendants verily believe that its use as a cloak for such operations will greatly increase. As an instance of the use of such regulations to hide smuggling defendants allege that on or about January 15, 1920, the British passenger steamship "Harbinger" sailed from Halifax, N. S., for Havana, Cuba, carrying with her a large quantity of intoxicating liquors listed as sea stores. The said vessel came into the port of Portland, Maine, alleging a shortage of coal, and there her liquor was sealed under customs seals. Her Master protested her innocence and claimed the right as a foreign vessel to transport intoxicating liquors as sea stores under seal within the territorial waters of the United States. This right was accorded her under the Treasury rulings until recently in force and on which complainant has relied until now. Being under suspicion, however, the "Harbinger" was convoyed by the coastguard cutter "Ossipee" to Cape Ann whence she entered the port of Boston and thence proceeded without convoy to the neighborhood of New York where she was met by the coastguard cutter "Gresham" which convoyed her to New York. On January 26th, she was convoyed down New York Bay by the coastguard cutter "Manhattan" to Dunham Shipyard, Staten Island. There she remained under customs surveillance until February 6th when the customs seals on the liquors were broken by the crew and an attempt was made to import them into the United States. When such attempt was made the crew of said vessel were arrested. Two have plead guilty to a violation of the Prohibition Act and the vessel has been libelled by the Government. After the crew were arrested it became evident that the journey of this vessel down the coast of the United States was not, as alleged and as appeared, because of insufficient coal-carrying space but for the purpose of finding purchasers of the liquor carried as sea stores.

Ninth. Defendants further allege that under the regulations of the Secretary of the Treasury referred to in the complaint herein, customs officers have made no physical inventory of the stores of liquors on any foreign ships either upon their arrival in the ports of the United States or upon their leaving such ports. Permission

has been given to remove certain of the liquors under seal for the purposes of rations given to the crews, but no record is kept of the amount of liquor which actually leaves United States ports  
25 on foreign vessels, nor is any inventory returned by such foreign vessels of the amount of liquors actually found when seals are broken by the ship's agents after leaving port.

Tenth. Defendants are informed and verily believe that the complainant makes large profits from the sale of intoxicating liquors on the high seas, such profits amounting to many thousand dollars per annum and further allege that loss of such profit is the only definitely ascertainable loss which the complainant will suffer if the National Prohibition Act as interpreted by the ruling of the Attorney General is given full force and effect.

Eleventh. Defendants further allege on information and belief that the sale of intoxicating liquors on the high seas by vessels carrying the American flag ceased with the issuance of the ruling of the Attorney General and is not now carried on. And defendants verily believe that if vessels of foreign registry are by the injunction of this Court facilitated in the sale of liquor on the high seas by being allowed to transport liquor within the territorial waters of the United States, the resultant damage to the American merchant marine will be great and irreparable. Not only will ships of the American merchant marine suffer the loss of revenue which they have hitherto enjoyed from the sale of intoxicating liquors on the high seas and which ships of foreign nations will continue to enjoy if the prayer of the complainant herein is granted, but defendants believe that a large number of passengers who would otherwise travel on American ships and who would travel on American ships if both American ships and foreign ships were placed in the same position in regard to the sale of liquor on the high seas, will, if foreign ships are placed  
in an advantageous position in this regard, travel on foreign  
26 & 27 ships and the American ships will lose a large amount of revenue thereby. Defendants are informed and verily believe that the loss of such revenue from the sales of liquor and from passage money in case of a differential treatment giving preference to foreign ships over American ships in the matter of transportation of intoxicating liquors within the territorial waters of the United States, will be sufficient to make it impossible for the American merchant marine to compete profitably with ships of foreign registry. The majority of the American passenger liners operating in the North Atlantic trade, in competition with complainant's and other foreign vessels are owned and operated directly by the United States Government. Any loss of revenue by reason of a differential treatment favorable to foreign ships will fall directly on the United States Government and its tax-payers.

Wherefore, defendants pray that the bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,  
*United States Attorney for the Southern  
District of New York, Attorney for  
Defendants.*

Office and P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

28 [Endorsed:] E. 25/16. U. S. District Court, Southern District of New York. International Navigation Company, Complainant, vs. Andrew W. Mellon, Secretary of the Treas. of U. S.; Henry C. Stuart, Acting Collector of Customs, etc., and Ralph A. Day, Federal Prohibition Director, etc., Defendants. Answer to Bill of Complaint. William Hayward, United States Attorney, Attorney for Defendants.

29 United States District Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HEN-  
DERSON BROTHERS), LTD.,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States,  
et al.,

And Ten Other Cases.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decrees upon the answers. The pleadings have been so drawn on both sides as to raise the merits of the controversy, and it is not necessary to set them forth in detail. The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and liquors as part of their sea-stores. This was done with the consent of the public authorities who promulgated regulations recognizing the practice, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an opinion at that time given by the Attorney General, was that, as part of the ship's stores, these wines and liquors, if sealed and kept on board, were not to be regarded as brought within the country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where

the peace of the sovereign is at stake. Later the permission so given was further extended to allow the ships to dispense to their crews their customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of *Grogan v. Walker*, and *Anchor Line v. Aldridge*, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration, on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying in and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed to execute the law in accordance with this opinion, and this created the situation out of which these bills arise.

The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in Europe so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal, and carried out again, only for the entertainment of passengers embarking from the United States. Besides the wines and liquors so used the steamers carry a stock for the use of their crews. In the case of the

French, Italian and Belgian ships the law of their flag requires them to supply a ration of wine and in those cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore, the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign lines; they have freely sold their wines and liquors at sea and brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some cases the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the Zone Officer, but the Collector of the Port of New York and the local Prohibition Director are defendants in all.

#### Appearances:

Hon. Van Vechten Veeder, for Oceanic Steam Navigation Co. Ltd., Liverpool, Brazil & River Plate Steam Navigation Co. Ltd., United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., The Netherlands American Steamship Co. (Holland American Line) and Pacific Steam Navigation Company.

Lucius H. Beers, Esq., for the Cunard Steamship Co., Ltd., and Anchor Line (Henderson Brothers).



Joseph P. Nolan, Esq., for Compagnie Generale Transatlantique.

Reid L. Carr for United American Lines, et al.

Cleatus Keating, Esq. and John M. Woolsey, Esq., for International Mercantile Marine & In. Nav. Co., Ltd.

William Hayward, Esq., United States Attorney, and John Holley Clark, Esq., Asst. U. S. Attorney, for Defendants in all cases.

32 LEARNED HAND, *D. J.*:

It is conceded, and indeed could not be disputed, after *Grogan v. Walker and Anchor Line v. Aldridge*, decided May 15, 1922, that, had the liquors here in question been a part of the ships' cargo, the bills would not lie. It makes no difference that they were not to be broached while carried within territory of the United States; the carriage would be transportation none the less. But because they are part of the ships' stores, in the sense that that term is generally understood, the plaintiffs argue that they do not fall within the same rule. This argument rests upon two alternative premises, first, that "transportation" involves a place where, and a person to whom, the goods are to be delivered, and second, that a ship's stores have by long custom been treated as a part of the "furniture," *Brough v. Whitmore*, 4 Term R. 206, or "appurtenances," *The Dundee*, 1 Hagg. Adm. 109, of the ship, which do not without particular mention become subject to the municipal law of the ports into which she enters, any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I do not see how that would help the plaintiffs. These liquors are carried for delivery at sea to the passengers and crew, and when so delivered their transportation ends. There appears to me no significant distinction in the fact that the place of delivery is the ship itself. The passengers, and for that matter, the crew, are not the same person as the owner, and if the passage of title or possession has anything to do with the matter, the title to, and possession of, the bottle or the dram, passes when it is handed to its consumer. The carriage within the limits of the Port of New York is a part of a transit whose purpose from the beginning is that very  
33 delivery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to  
search out and coal at sea friendly cruisers during war, as happened in 1914.

Therefore, I might admit the plaintiffs' interpretation of the word, if it were necessary. Nevertheless, it seems to me at best very doubtful whether it carries with it any such limitation. The cases on which the plaintiffs rely come only to this, that the jurisdiction of the United States under the interstate commerce clause does not terminate until delivery after a transit across State lines, *Gloucester Perry Co. v. Pa.*, 114 U. S. 196, *Rhodes v. Iowa*, 170 U. S. 412, *Louisville & Nashville R. R. v. Cook Brewing Co.*, 223 U. S. 70, *Daniger v. Cooley*, 248 U. S. 319. From this it does not follow that the term, "transportation," as used in this statute, implies delivery to another than the person who carries the liquors. Suppose, for example, a

parcel of liquor, made after the Amendment, and carried off to be laid away in a cache. There can be no question, I believe, that two separate crimes would be committed, "manufacture" and "transportation."

Nor does it seem to me that the thirteenth and fourteenth sections of Title II of the Prohibition Act, help the plaintiffs. Under these carriers are required to mark the consignor's and consignee's names on the outside of all packages. But it does not follow that a regulation like this of one kind of transportation imputes to the word itself any of the conditions which it enacts. In common use to transport means to carry about, and I see no reason why it should mean less in Section three. The law clearly intended by immobilizing liquor

34 to make surreptitious traffic in it impossible and its policy would as well cover movements which might be incidental to, as those which immediately terminated in, a delivery to someone else. The case of *Street v. Lincoln Safe Deposit Company*, 254 U. S. 88, did not decide anything to the contrary; it turned upon the fact that the possession of the liquor in the leased room and in the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as Street had, for the possession of the liquor. I conclude therefore that the carriage in question is "transportation."

The first point being thus disposed of, I come to the second. It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States, (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they must be manifested and may not be excessive in quantity, as such they are not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbade generally the transportation of liquors, it must be read in the light of this statute and the long usage under it, and that what is not within the United States for the purposes of customs

35 ought not to be so for purposes of prohibition. In addition they urge that under the maritime law it is held that for most purposes sea-stores will be treated as a part of the ship herself. If she is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and least of all a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to these. *Brown v. Duchesne*, 19 How. 183, *Taylor v. U. S.*, 207 U. S. 121, *Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122. Nevertheless everyone must agree that the question is no more than one of inter-

pretation, for in the cases at bar Congress certainly might, if it chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

Grogan v. Walker, *supra*, and Anchor Line v. Aldridge, *supra*, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thorough-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the Amendment, and its very want of particularity is a good index that it meant to cover what it could. For this reason it is to be distinguished from earlier local acts of the same kind, as for  
 36 example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful, since in form it only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the policy, and not the promise, of the nation. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

However, the motives for positively assuming that such stores must be considered as included within Section three appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legislative

motives is speculative, but that vice, if it be one, is of the plaintiffs making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitation on that meaning, because of the supposed intent of Congress. Since, therefore, I am asked to have a recourse to implications, I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises.

In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan v. Walker*, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the law runs for all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of the stocks  
 38 are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside *Ambrose Light*. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. No do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question

it must be enough for him that each is forbidden.  
 39 It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can

made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the section covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crews' rations stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later.

Cases like *Brown v. Duchesne*, supra, *Taylor v. U. S.*, supra, and *Scharrenberg v. U. S.*, supra, are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is *sui generis*, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages. It is true that the prayers for relief do include so much, but prayers without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs

than anything I may think about the law. The power under the Seventy-fourth Rule to grant such an order is undoubted, notwithstanding a dismissal of the bill, *Merrimac River Savings Bank v. City of Clay Center*, 219 U. S. 527, *Staffords v. King*, 90 Fed. R. 136 (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he holds his decree. Like all such matters, it depends upon a balance between the two, and I must now assume that the chances of success are not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some nicety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far as the loss of the liquors themselves is concerned the damage cannot be said to be irreparable. These must be condemned before they can be forfeited, and in the present state of the calendars the cases at bar will be finally determined long before such libels can be tried. If I am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the long acquiescence of the authorities in the practices here in question will moderate the ultimate penalty of confiscation; I must assume that

the plaintiffs will receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as part of the crews' ration. If the ration is cut off, some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages to stay the enforcement of the law against stocks of wine and liquor necessary for crews' rations, if honestly kept and dispensed for that purpose alone.

As to the maintenance of Passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing inter se and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is easy to say, if one does not take seriously the opinion behind

the Amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury which no judge has the right to ignore. The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is.

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge the plaintiffs have no case. Therefore I will go no further than to issue an injunction against interfering with the carriage of a stock necessary for the crews' rations on the east-bound voyage. The plaintiffs must each give a bond in the sum of twenty-five thousand dollars, conditional against the use of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal if the same be taken at once. Settle orders on notice.

— — —, *D. J.*

October 23, 1922.

45 [Endorsed:] United States District Court, Southern District of New York. Opinion. Learned Hand, *D. J.*

46 At a Stated Term of the District Court of the United States for the Southern District of New York Held in the Court Rooms Thereof, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 24th Day of October, 1922.

Present: Hon. Learned Hand, District Judge.

In Equity.

INTERNATIONAL NAVIGATION COMPANY, LIMITED, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

This cause came on to be heard at this term upon motions by the defendants to dismiss the amended bill of complaint, and by the plaintiffs for a final decree in their favor on the pleadings, and was



argued by counsel; and thereupon, upon consideration thereof, it was

47 Ordered, adjudged and decreed that the bill of complaint herein be dismissed and defendants have judgment against the complainants for their costs to be taxed, and it is further

Ordered, adjudged and decreed that until final hearing of this cause in the Supreme Court of the United States and the entry of an order or decree on the mandate of that Court, the defendants, their servants, agents and subordinates, be and they hereby are stayed and restrained from seizing or interfering with the possession or carriage by complainants herein (1) of all stocks of liquors on vessels sailing westward on or before October twenty-seventh, provided that such stocks are not taken out of the United States unless authorized by the Secretary of the Treasury or other authority, (2) of a stock of liquors customary for the rations of the crews of complainants' vessels upon each east bound voyage, upon the filing of a bond in the penal sum of twenty-five thousand dollars (\$25,000), conditioned against the gift, issuance or sale of such stock of liquors by complainants otherwise than as crews' rations to the crews of complainants' vessels, and it is further

Ordered, adjudged and decreed that if complainants shall fail to take an appeal herein to the Supreme Court of the United States within five days from the entry hereof, or to move for preference on the first motion day of the Supreme Court, the defendants may move herein to vacate the injunction granted above.

LEARNED HAND,  
U. S. D. J.

50 [Endorsed:] U. S. District Court, Southern Dist. of N. Y.  
International Navigation Company, Ltd., Complainant  
against Andrew W. Mellon, etc., et al. Order. Kirlin, Woolsey  
Campbell, Hickox & Keating, Attorneys for Complainants, 27 William Street, New York, N. Y.

51 In the District Court of the United States for the Southern District of New York.

In Equity.

No. 25, p. 16.

INTERNATIONAL NAVIGATION COMPANY, LIMITED, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, and John D. Appleby, Chief Zone Officer, De-  
fendants.

*Petition for Appeal.*

The above named complainant conceiving itself aggrieved by a  
decree made and entered on the 24th day of October, 1922 in the  
above entitled cause, does hereby appeal from said order and decree  
to the Supreme Court of the United States for the reasons specified  
in the assignment of errors which is filed herewith and it prays that  
this appeal may be allowed and that the transcript of the record,  
pleadings and papers upon which the said decree was made duly  
authenticated may be sent to the Supreme Court of the United States.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX  
& KEATING,

*Solicitors for Complainant.*

The foregoing claim for appeal is allowed.

LEARNED HAND,  
*United States District Judge for  
the Southern District of New York.*

Dated, October 24, 1922.

52 In the District Court of the United States for the Southern District of New York.

In Equity.

INTERNATIONAL NAVIGATION COMPANY, LIMITED, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York; Ralph A. Day, Federal Prohibition Director for the  
State of New York, and John D. Appleby, Chief Zone Officer, De-  
fendants.

The complainant hereby assigns error in the final judgment or  
decree of the District Court herein entered October —, 1922, in the  
following respects:

First. The Court erred in dismissing the bill of complaint herein.

Second. The Court erred in denying the petition for an injunction.

Third. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States prohibits a foreign ship from keeping on board while on the territorial waters of the United States intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

53 Fourth. The Court erred in holding that the National Prohibition Act prohibits a foreign ship from keeping on board while on the territorial waters of the United States, intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the crew as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Sixth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the passengers as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Seventh. That the National Prohibition Act as construed and applied by the District Court is unconstitutional and void because enforcement thereof with respect to sea stores on the complainant's vessels would deprive the complainant of its property and subject it to penalties without due process of law.

54 Eighth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the third and fourth assignments of error constitute a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Ninth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels

are on the territorial waters of the United States in the circumstances mentioned in the Fifth and Sixth Assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Tenth. The Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverages in the circumstances mentioned in the Third, Fourth, Fifth and Sixth assignments of error is prohibited by the Eighteenth Amendment and the National Prohibition Act.

Eleventh. The Court erred in refusing to hold that the interpretation of the National Prohibition Act mentioned in the Ninth assignment of error was unconstitutional and invalid and not within the powers conferred by Congress by the Constitution.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX &  
KEATING,

*Solicitors for Complainant.*

55 District Court of the United States of America for the Southern District of New York, in the Second Circuit.

INTERNATIONAL NAVIGATION COMPANY, LIMITED, Complainant-  
Appellant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuard, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants-Respondents.

*Bond on Appeal.*

Know all men by these presents, That National Surety Company, corporation under the Laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, is held and firmly bound unto the above named Andrew W. Mellon, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, in the sum of two hundred and fifty (\$250.00) dollars, to be paid to the said Andrew W. Mellon, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, for the payment of which well and truly to be made, said National Surety Company, binds itself, its successors and assigns, firmly by these presents. Sealed and dated the 24th day of October, 1922.

Whereas, the above named International Navigation Company, Limited, Appellant, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the District Court of the United States for the Southern District of New York on the 24th day of October, 1922.

Now, therefore, the condition of this obligation is such, That if the above named International Navigation Company, Limited, shall prosecute said appeal to effect, and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NATIONAL SURETY COMPANY,  
By ROBERT H. NUGENT,  
*Resident Vice President.*

Attest:

[SEAL.] M. C. McGRATH,  
*Resident Asst. Secretary.*

57-59 National Surety Company.

Capital \$5,000,000.00.

*Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,  
*County of New York, ss:*

On this 24th day of October, one thousand nine hundred and Twenty Two, before me personally came Robert M. Nugent, known to me to be the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of International Navigation Company, Limited, as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of International Navigation Company, Limited, is the corporate seal of said National Surety Company, and was thereto affixed by the order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with M. C. McGrath and knows him to be the Resident Assistant Secretary of said Company; that the signature of said M. C. McGrath subscribed to said Bond is in the genuine handwriting of said M. C. McGrath, and was thereto subscribed by order and authority of said Board of Directors; and in the presence of said de

ponent; that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Ten Million (\$10,000,000) Dollars.

That ——— is the agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

ROBERT M. NUGENT.

(Department's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 24th day of October, 1922.

[SEAL.]

H. E. EMMETT,

*Notary Public for Kings County, No. 31.*

(Officer's Signature, description and Seal.)

Certificate filed in New York County, No. 62.

Suffolk, Nassau, Bronx No. 2, Queens No. 860, Richmond & Westchester Co.

Kings County Register's Office No. 4067.

New York County Receiver's Office No. 405.

Bronx County Register's Office No. 42.

Commission expires March 30, 1924.

60

### *Citation on Appeal.*

By the Honorable Learned Hand, One of the United States District Judges for the Southern District of New York, in the Second Circuit, to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at the City of Washington, District of Columbia, on the 20th day of November, 1922, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein International Navigation Company, Limited, is complainant and you are defendants to show cause, if any there be, why the decree in said cause mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 24th day of October, in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

LEARNED HAND,

*United States District Judge for the Southern  
District of New York, in the Second Circuit.*

## 61 United States District Court for the Southern District of New York.

INTERNATIONAL NAVIGATION COMPANY, LIMITED, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, and John D. Appleby, Chief Zone Officers,  
Defendants.

It is hereby stipulated and agreed by and between the solicitors  
for the respective parties hereto that the foregoing documents may  
constitute the record in the above-entitled cause, as agreed upon by  
the parties to be filed with the Clerk of the Supreme Court of the  
United States, and that the Clerk of the United States District Court  
for the Southern District of New York may certify the same to the  
Clerk of the Supreme Court of the United States as such record.

Dated, New York, October 24, 1922.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX  
& KEATING, *Solicitors for Complainant.*  
WM. HAYWARD, *Solicitor for Defendants.*

## 62 United States District Court, Southern District of New York.

INTERNATIONAL NAVIGATION COMPANY, LIMITED, Complainant,  
against

ANDREW W. MELLON et al., Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the  
United States of America for the Southern District of New York, do  
hereby certify that the foregoing is a correct transcript of the record  
of the said District Court in the above entitled matter as agreed upon  
by the parties.

In testimony whereof I have caused the seal of the said District  
Court to be hereunto affixed at the City of New York in the Southern  
District of New York this twenty-fourth day of October, in the year  
of our Lord the one thousand *nineteen* hundred and twenty-second  
and of the Independence of the said United States the one hundred  
and forty-seventh.

[Seal of the District Court of the United States, Southern Dis-  
trict of N. Y.]

ALEX GILCHRIST, JR., *Clerk.*

Endorsed on cover: File No. 29,211. S. New York D. C. U. S.  
Term No. 661. International Navigation Company, Limited, appel-  
lant, vs. Andrew W. Mellon, Secretary of the Treasury of the United  
States, et al. Filed October 25th, 1922. File No. 29,211.



# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 662.

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COMPAGNIE GENERALE TRANSATLANTIQUE,  
APPELLANT,

vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, *ET AL.*

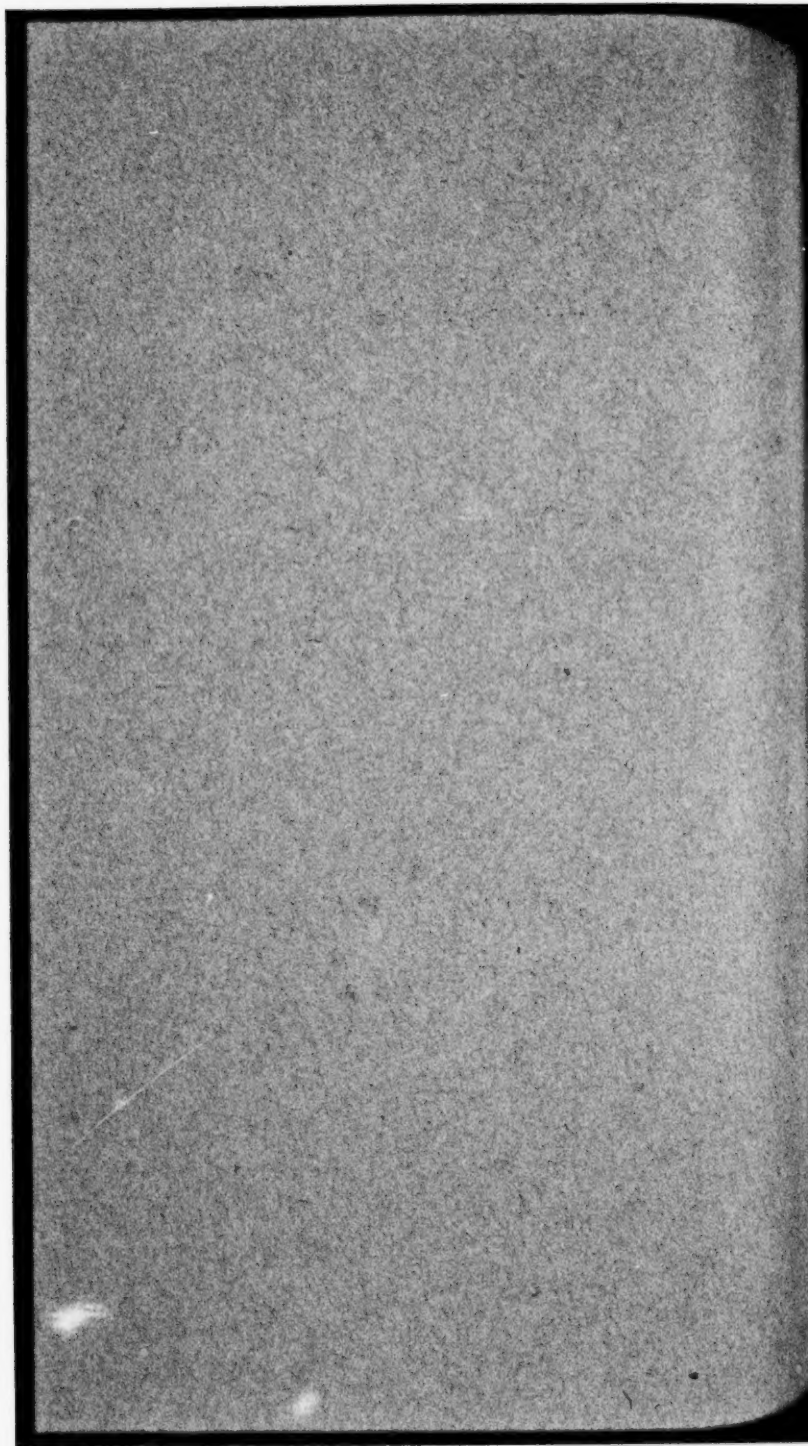
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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FILED OCTOBER 25, 1922.

(29,212)



(29,212)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 662.

COMPAGNIE GENERALE TRANSATLANTIQUE,  
APPELLANT,

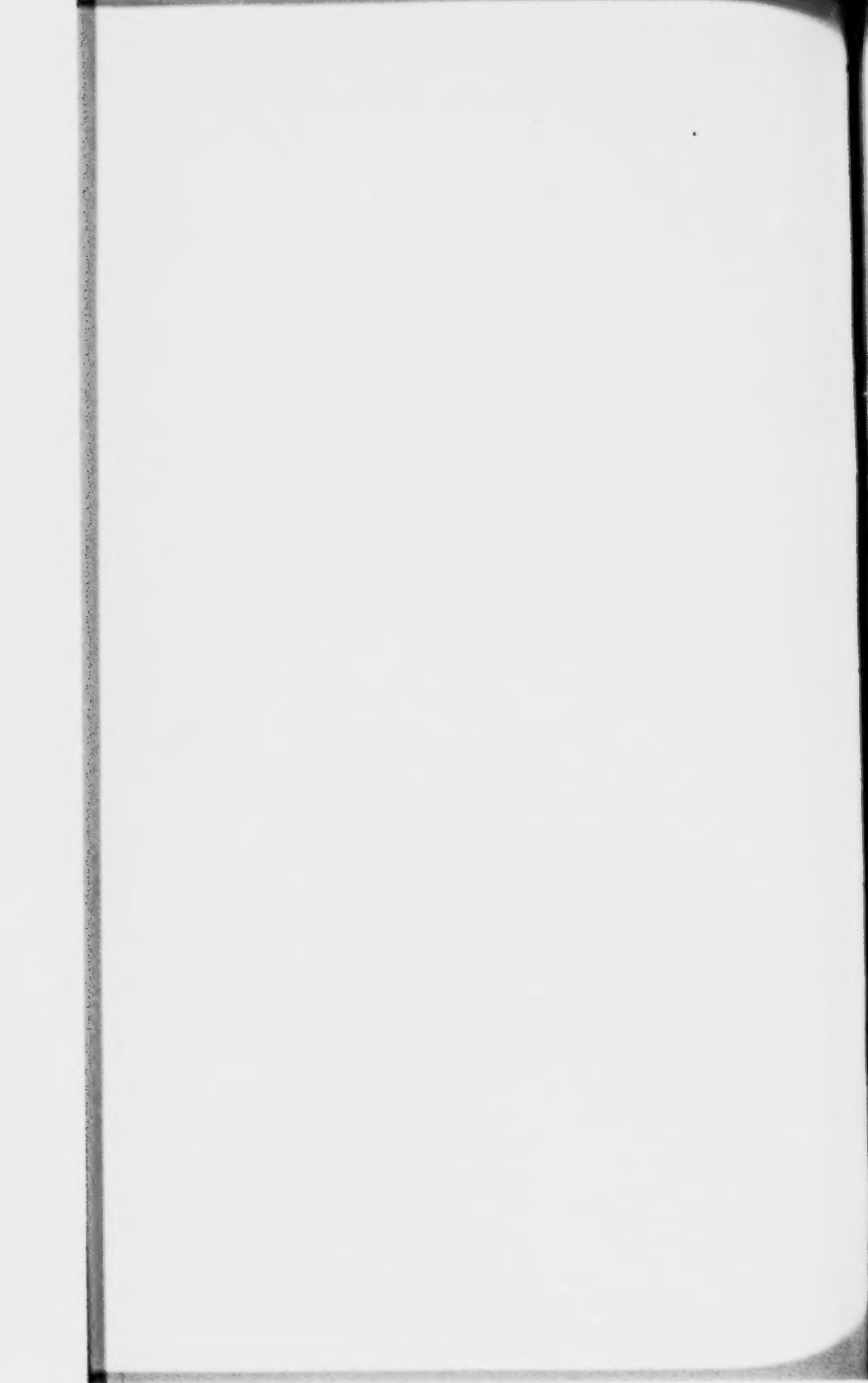
*vs.*

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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1 The President of the United States of America to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Compagnie Generale Transatlantique, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 14th day of October, in the year One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

ALEX GILCHRIST, JR.,  
Clerk.

JOSEPH P. NOLAN,  
Complainant's Sol'r.

The defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

ALEX GILCHRIST, JR.,  
Clerk.

U. S. District Court, Southern District of New York.

E. 25/14.

COMPAGNIE GENERALE TRANSATLANTIQUE, Complainant,  
versus

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York.

*Notice of Appearance and Demand.*

You will please take notice that I am retained by, and appear as attorney for, the Defendants in this action, and demand service of a copy of the complaint and all papers in this action upon me, at my

office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours,

WILLIAM HAYWARD,  
United States Attorney,  
Attorney for Defendant.

New York, October 16, 1922.

To Joseph P. Nolan, Esq., 25 Broad Street, Attorney for Plaintiff.

- 4 In the District Court of the United States for the Southern District of New York.

In Equity.

COMPAGNIE GENERALE TRANSATLANTIQUE, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendents.

On reading the annexed Bill of Complaint, let the defendants herein show cause before this Court at a Term thereof for the hearing of motions to be held at Room 237 the Post Office Building, Borough of Manhattan, City of New York, on the 17th day of October, 1922, at 10:30 a. m. o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made restraining the defendants, their agents, servants and subordinates, during the pendency of this suit, from seizing, disturbing, removing or in any way interfering with intoxicating beverages, liquors or wines or any of them carried on complainant's ships as ship's stores, as more particularly set forth in the bill of Complaint herein, and restraining the defendants, their agents, servants and subordinates, during the pendency of this suit, from seizing, disturbing or in any way interfering with complainant's said ships by reason of the carriage thereon of said intoxicating beverages, liquors and wines as such ship's stores, and why the complainants should not have such other and further relief as may be just.

Sufficient cause appearing, service of a copy of this order on the defendants on or before the — day of October, 1922, shall be sufficient service.

LEARNED HAND,  
United States District Judge.

6 In the District Court of the United States for the Southern District of New York.

In Equity.

COMPAGNIE GENERALE TRANSATLANTIQUE, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of Customs for the Port of New  
York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, Defendants.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The Complainant, Compagnie Generale Transatlantique, a Corporation, brings this its Amended Bill of Complaint against the above-named defendants, and respectfully shows unto this Honorable Court as follows:

First. The Complainant, Compagnie Generale Transatlantique, is a Corporation duly organized and existing under the laws of the Republic of France, with its principal place of business in Paris, France.

Second. Complainant is informed and verily believes, and, therefore, alleges on information and belief:

The defendant Andrew W. Mellon is Secretary of the Treasury of the United States, and *that* said defendant is, and his subordinates are, by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of the United States and the making of Regulations *and* promulgated for the purpose of enforcing such Acts of Congress.

The defendant Henry C. Stuart is a subordinate of the said Secretary of the Treasury, and is Acting Collector of Customs for the port of New York, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury, which from time to time may be promulgated, within that portion of the Port of New York wherein the complainant desires to bring its vessels equipped with certain sea stores as hereinafter set forth.

The defendant Ralph A. Day is a subordinate of the said Secretary of the Treasury, and is the prohibition Director for the State of New York, which State embraces that portion of the Port of New York wherein the complainant desires to bring its vessels equipped as aforesaid, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress passed under authority of the Eighteenth Amendment



to the Constitution of the United States, and regulations of Executive Departments of the United States Government promulgated for the enforcement of such Acts of Congress.

Third. This is a suit of a civil nature, arising under the Constitution, Laws and Treaties of the United States. The matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00) in value, exclusive of interest and costs.

Fourth. Complainant was incorporated under the laws of the Republic of France for the purpose of carrying on a steamship business of transporting, as common carriers, passengers and cargo for hire on the high seas, and in carrying the government mails between France and the United States, and, in transacting such business, the complainant maintains and operates fleets of steamships which ply between ports of the Republic of France, and other ports of Europe, and between ports in the Republic of France and the United States.

All of said steamships are French built vessels, and registered in France and not in the United States, and fly the French flag. Twenty of such ships carry passengers. Said ships are worth many millions of dollars, and they ply regularly and frequently  
 9 between European ports and the Port of New York, more especially between ports of France and the United States. Complainant leases piers known as piers Numbers 57 and 74 North River, New York City.

Fifth. The crews operating complainant's vessels, including those carrying passengers and cargo and those carrying cargo alone, are made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic liquors for beverage purposes is not prohibited and by whose customs the use of alcoholic liquors for beverage purposes is so widespread that complainant believes it would experience the greatest difficulty in obtaining adequate crews to operate its vessels running to the United States if *they* were prohibited from furnishing a usual and reasonable amount of liquor to members of the crews.

None of the intoxicating liquors so kept as sea stores for reasonable use of passengers and crew have been manufactured, sold or transported within, imported into, or exported from the United States; any territory subject to the jurisdiction of the United States. All wines and other intoxicating liquors kept as sea stores on complainant's vessels, as aforesaid, have been legally acquired.

Sixth. The compensation received by complainant for the carriage of passengers amounts in the aggregate to many millions of  
 10 dollars annually, including the years 1920 and 1921.

Among the passenger vessels regularly crossing the North Atlantic from European ports are many which land at Canadian ports and, if your complainant is prohibited from furnishing its crew and passengers with alcoholic beverages, a large number of passengers who would otherwise have patronized complainant's ships, will patronize lines landing at Canadian ports.

The prohibition of the use of alcoholic liquors on complainant's vessels as sea stores, for the reasonable use of crew and passengers, would cause your complainant great pecuniary loss by reason of the difficulty of obtaining crews, and would cause a great loss of receipts from passenger business, and will involve irreparable damage to your complainant, in that it will destroy a considerable part of its business and render a considerable part of its equipment useless and cause a loss of its profits.

Seventh. That your complainant is a corporation organized and existing under the laws of the Republic of France, and its principal offices are maintained in France, and the home ports of all of its said ships are French ports, and all of its ships carry the French flag, and are subject to the laws of the Republic of France.

That by the laws of the Republic of France your complainant is required to furnish daily to each member of the crew of each  
11 of its said steamships one-half liter of wine of alcoholic content per day, and to each stoker on said steamships one liter of wine of alcoholic content per day.

Eighth. That the said law of the Republic of France is, by operation of law, written into the contract of employment of each member of the crew of each of such steamships, and the said allowance of wine is part of the hire paid to each member of the crew under the terms of the law of the Republic of France.

Ninth. And your complainant further alleges that by the said law of the Republic of France your complainant is not permitted to employ, as members of the crew of each of such steamships, more than one-third of the total number of the crew of other nationalities than that of France.

Tenth. That the said law of the Republic of France was in full force and effect at the time the National Prohibition Act of October 28th, 1919, was adopted, and is now in full force and effect throughout the Republic of France, and was, and is, binding upon your complainant, its officers, agents and employees, including the captain and officers of each of your complainant's said ships, and your complainant alleges that the failure of your complainant, its officers, agents and employees to obey the said law of the Republic of France  
2 would result in the subjecting of your complainant, its officers, agents and employees, to penalties enforceable against it under the laws of the Republic of France, and would result in the inability of your complainant to use and operate each of its said steamships.

Eleventh. Since the adoption of the so-called National Prohibition Act on October 28, 1919, complainant's ships have been permitted freely to go and come in the Port of New York, and to carry intoxicating liquors for beverage purposes as sea stores for crew and passengers, pursuant to the Regulations of the Secretary of the Treasury hereto annexed and marked "Schedule A" and "Schedule B," and reference thereto is prayed.

In reliance upon, and under the authority of, the above-mentioned Treasury Decision, and the Regulations promulgated in connection therewith, and the procedure always followed as above described, complainant, in good faith, purchased, in foreign ports, and now has on board its vessels on the high seas, bound for the United States, as sea stores, quantities of intoxicating liquor of a value in excess of Three Thousand Dollars (\$3,000.00).

Twelfth. All of the alcoholic liquors carried as such sea stores on complainant's vessels are produced and manufactured in countries other than the United States, or territory subject to its jurisdiction. All such liquor for sea stores is taken on board complainant's vessels at European ports, and no part of such liquors is intended to be landed in the United States.

13 Thirteenth. Complainant is informed and verily believes, and, therefore, alleges that on or about the sixth day of October, 1922, the Attorney General of the United States rendered a ruling, or opinion, in which, among other things, he ruled that foreign ships carrying intoxicating beverage liquor as ships' stores, within the three-mile limit of our shores, are violating the provisions of the National Prohibition Act prohibiting possession or transportation of intoxicating liquors for beverage purposes, and that thereafter the President of the United States directed the defendant, the Secretary of the Treasury, to proceed to the formulation of regulations for the enforcement of such ruling with respect to foreign ships.

Complainant is informed and believes that the defendant, the Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States, and threaten to enforce said Prohibition Act as interpreted by the Attorney General.

Fourteenth. Complainant is advised by counsel, and verily believes, that the aforesaid ruling by the Attorney General in respect to foreign ships carrying intoxicating beverage liquors as ships' stores for crew and passengers, and any regulations formulated by the Secretary of the Treasury for the enforcement of such ruling are, and will be, unauthorized and void because neither the Eighteenth Amendment, nor the National Prohibition Act, prohibit the carriage of such liquors as such sea stores for crew and passengers, and an interference with the carriage of such sea stores would, therefore, violate complainant's rights under existing treaties between the United States and France, and otherwise, and also would deprive complainant of its property without due process of law.

Fifteenth. Complainant is advised by counsel, and verily believes, that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General, as aforesaid, is correct, it renders said act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the

Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said act, it is unconstitutional.

Sixteenth. Complainant alleges that the defendant Andrew W. Mellon, or his subordinates, are preparing regulations, and that pursuant to said opinion of the Attorney General or such regulations, the defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart and Ralph A. Day, are threatening, notwithstanding the fact that the interpretation of the

15 Act of Congress, known as the National Prohibition Act, by the the Attorney General is erroneous, unauthorized and void, and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said act, and notwithstanding the fact that said National Prohibition Act, if it purports to prohibit the carriage of said alcoholic beverages as sea stores for crew and passengers, is unconstitutional and void for the reasons hereinabove stated, it is, nevertheless, the intent and threat of the defendants herein to seize said alcoholic liquors now constituting sea stores on complainant's vessels (some of which are now on the high seas bound for the Port of New York), and to enforce against the complainant, its officers, agents and servants, various pains and penalties, including fines and imprisonment, and various forfeiture of property provided by the Acts of Congress, and regulations, and thus involve the complainant, its officers, agents and servants in numerous suits, and by such threats to prevent complainant, its employes and servants, from carrying out its contract in the Port of New York, and thus deprive the complainant of its business; all to the irreparable damage of complainant, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainant would be involved in numerous suits if it were forced to bring an action at law to relieve its employees and property from such penalty and forfeiture, which contract, under the laws of France, as above set forth, must provide for the furnishing of wines as aforesaid

16 to the said crew. That unless the complainant can immediately procure from this Honorable Court relief in the premises, that there will be, in that event, a cessation of complainant's business for an indefinite and probably considerable time; such cessation of business will involve irreparable damage to complainant in that it will destroy a considerable part of its business, and render a considerable part of its equipment useless.

Forasmuch, therefore, as complainant is without remedy in the premises, except in a court of equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled, it respectfully prays that the above named defendants and each of them be directed to make a full, true and perfect answer to this bill of complaint but not under oath, an answer under oath being expressly waived, and that said defendants, their agents, servants, subordinates and employes, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting

to enforce or cause to be enforced against the complainant, its officers, servants and employes, or any of them, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General

and from arresting and prosecuting the complainant, its officers, agents, servants or employes, or any of them, or on account of any alleged violation by them, of the Eighteenth Amendment, or the National Prohibition Act, on the ground or claim that the carriage of said intoxicating liquors as aforesaid, as sea stores for crew and passengers, is contrary to law.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause whereby the defendants, their agents, servants, subordinates and employes, and each and every one of them be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainant further prays that a writ of subpoena be issued hereon, directed to said defendants, commanding them on a day set, to appear and answer the amended bill of complaint herein.

### COMPAGNIE GENERALE TRANSATLANTIQUE,

By OSCAR R. CAUCHOIS,  
*Acting General Representative for*  
*U. S. and Canada.*

JOSEPH P. NOLAN,  
*Solicitor for Complainant.*

18 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

Oscar R. Cauchois, being duly sworn, deposes and says:

That he is the Acting General Representative for the United States and Canada of the Compagnie General-Transatlantique, the complainant herein. That he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That the sources of deponent's information and the grounds of his belief, as to all matters stated on information and belief, are statements made to him by employes of the complainant.

That the reason this verification is made by deponent and not by the complainant is that complainant is a foreign corporation, organized and existing under the laws of the Republic of France, and no officer or director thereof is within the State of New York, and deponent, as aforesaid, the Acting General Representative thereof and, therefore, makes this verification on its behalf.

That deponent is duly authorized to make the within complaint and generally to make any and all complaints, answers, claims, declarations, verifications and acts for said Compagnie General

Transatlantique in the premises that may be necessary for the transaction of its business herein.

OSCAR R. CAUCHOIS.

Sworn to before me this 18th day of October, 1922.

HUGH D. SMITH,  
*Notary Public.*

Kings County 308.  
Kings County Register 4126.  
Certificate filed New York County 1168.  
New York County Register 4105.

SCHEDULE A.

(Copy.)

(T. D. 38218.)

Sea Stores—Liquor.

Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 106 and 107 of the Customs Regulations of 1915 as amended.

Treasury Department, December 11, 1919.

To Collectors of Customs and Others Concerned:

All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part hereof to be removed from under seal for use by the crew at meals for any other purpose.

Excessive or surplus liquor stores are no longer dutiable, being prohibited importations, but are subject to seizure and forfeiture.

Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same Line or owner.

Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(Signed)

JOUETT SHOUSE,  
*Assistant Secretary.*

(99623.)

21

## SCHEDULE B.

(Copy.)

(T. D. 38248.)

## Sea Stores—Liquors.

Opinion of the Attorney General with respect to the practice under T. D. 38218 of sealing liquors listed as sea stores on vessels while in ports of the United States. Distinction made between American and foreign vessels. T. D. 38218 amended.

Treasury Department, January 27, 1920.

To Collectors of Customs and Others Concerned:

Attention is invited to the appended copy of an opinion rendered the Department by the Attorney-General with respect to the practice under T. D. 38218 of sealing liquors carried as sea stores on all vessels while in the ports of the United States, as indicated by the questions submitted to him.

Following the opinion of the Attorney-General the first paragraph of T. D. 38218 is hereby amended to read as follows:

22 All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on foreign vessels should be sealed on arrival of the vessel in port, and such portions thereof released from time to time for use by the officers and crew.

The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification.

JOUETT SHOUSE,  
Assistant Secretary.

(108377.)



23 In the District Court of the United States for the Southern District of New York.

COMPAGNIE GENERALE TRANSATLANTIQUE, Complainant,  
against

ANDREW M. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Answer to Amended Bill of Complaint.*

Now come the defendants herein and in answer to the amended bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the amended bill of complaint herein and divers parts thereof be dismissed, and assign the following grounds for this motion, namel:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.

2. The Court has no jurisdiction to grant the relief prayed for or any part thereof.

3. The bill does not present a cause of action in equity under the Constitution of the United States.

4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

6. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

4 Second. In answer to the allegations set out in paragraph six of the complaint the defendants allege on information and belief that any difficulty which complainant might experience in obtaining adequate crews from among the nationals of countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread would be readily obviated by the payment of higher wages to said crews. Defendants are further informed and believe that many of the vessels of the American merchant marine carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages and that the said American vessels have never had the least difficulty in obtaining adequate crews from the nationals of such countries at the same wages paid to American crews.

Third. Defendants deny the allegations contained in paragraph 14th of the amended bill of complaint that the ruling by the Attorney General referred to in said paragraph is and any regulations for the enforcement of such ruling are and will be unauthorized and void. Defendants further deny the allegation that such ruling and such regulations would violate complainant's rights under existing treaties between the United States, Great Britain and otherwise.

Fourth. Defendants deny the allegation contained in paragraph 15th of the amended bill of complaint that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is correct, it renders said act unconstitutional and void for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional. The defendants allege on the other hand that it is well within the powers of Congress delegated to it by the Eighteenth Amendment to the Constitution of the United States to declare the possession of intoxicating liquor to be unlawful and that such legislative declaration contained in the National Prohibition Act is a valid exercise of the legislative power and has a reasonable relation to the enforcement of the constitutional mandate.

For a separate and distinct defense herein, defendants allege:

Fifth. Defendants re-allege and re-affirm as part of this separate and distinct defense each and every allegation contained in paragraphs first to fourth above.

Sixth. Defendants are informed by their attorney and therefore allege that if the complainant is correct in its construction of the National Prohibition Act the implications involved are exceedingly serious and the claim of the complainant, if allowed, would curtail with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States.

Seventh. Defendants are further informed and believe and therefore allege that for two years last past a large and profitable business has been carried on by divers persons with the object and result of importing liquor into this country contrary to law; that the vessels used by such persons are vessels under foreign registry and that such vessels sail from foreign ports with clearance papers showing that they are bound for other foreign ports. The actual destination of such vessels is not the port shown on their clearance papers but some point on the high seas near the coast of the United States from which its liquors are transferred to smaller boats which complete the smuggling and importation of the liquor into the United States. Up to the present time the vigilance of the customs officials in seizing such vessels when they come within the territorial limits of the United States has somewhat mitigated the evils of this traffic but if, as complainant contends

only necessary to put liquors under lock and key to make such transportation legal and foreign vessels can sail our territorial waters at will with cargoes of liquor, the enforcement of the prohibition against the importation of liquors, already difficult, will become practically impossible.

Eighth. The rulings of the Secretary of the Treasury referred to in the bill of complaint have already been used as a cloak to hide smuggling operations and if the doctrine underlying such rulings is declared to be the law as claimed by complainant, defendants verily believe that its use as a cloak for such operations will greatly increase. As an instance of the use of such regulations to hide smuggling defendants allege that on or about January 15, 1920, the British passenger steamship "Harbinger" sailed from Halifax, N. S. for Havana, Cuba, carrying with her a large quantity of intoxicating liquors listed as sea stores. The said vessel came into the port of Portland, Maine, alleging a shortage of coal, and there her liquor was sealed under customs seals. Her Master protested her innocence and claimed the right as a foreign vessel to transport intoxicating liquors as sea stores under seal within the territorial waters of the United States. This right was accorded her under the Treasury rulings until recently in force and on which complainant has relied until now. Being under suspicion, however, the "Harbinger" was convoyed by the coastguard cutter "Ossipee" to Cape Ann whence she entered the port of Boston and thence proceeded without convoy to the neighborhood of New York where she was met by the coastguard cutter "Gresham" which convoyed her to New York. On January 26th, she was convoyed down New York Bay by the coastguard cutter "Manhattan" to Dunham Shipyard, Staten Island. There she remained under customs surveillance until February 6th when the customs seals on the liquors were broken by the crew and an attempt was made to import them into the United States. When such attempt was made the crew of said vessel were arrested. Two have pleaded guilty to a violation of the Prohibition Act and the vessel has been libelled by the Government. After the crew were arrested it became evident that the journey of this vessel down the coast of the United States was not, as alleged and as appeared, because of insufficient coal-carrying space but for the purpose of finding purchasers of the liquor carried as sea stores.

Ninth. Defendants further allege that under the regulations of the Secretary of the Treasury referred to in the complaint herein, customs officers have made no physical inventory of the stores of liquors on any foreign ships either upon their arrival in the ports of the United States or upon their leaving such ports. Permission has been given to remove certain of the liquors under seal for the purposes of rations given to the crews, but no record is kept of the amount of liquor which actually leaves United States ports on foreign vessels, nor in any inventory returned by such foreign vessels of the amount of liquors actually found when seals are broken by the ship's agents after leaving port.

Tenth. Defendants are informed and verily believe that the complainant makes large profits from the sale of intoxicating liquors on the high seas, such profits amounting to many thousand dollars per annum and further allege that loss of such profit is the only definitely ascertainable loss which the complainant will suffer if the National Prohibition Act as interpreted by the ruling of the Attorney General is given full force and effect.

Eleventh. Defendants further allege on information and belief that the sale of intoxicating liquors on the high seas by vessels carrying the American flag ceased with the issuance of the ruling of the Attorney General and is not now carried on. And defendants verily believe that if vessels of foreign registry are by the injunction of this Court facilitated in the sale of liquor on the high seas by being allowed to transport liquor within the territorial waters of the United States, the resultant damage to the American merchant marine will be great and irreparable. Not only will ships of the American merchant marine suffer the loss of revenue which they have hitherto enjoyed from the sale of intoxicating liquors on the high seas and which ships of foreign nations will continue to enjoy if the prayer of the complainant herein is granted, but defendants believe that a large number of passengers who would otherwise travel on American ships and who would travel on American ships if both American ships and foreign ships were placed in the same position in regard to the sale of liquor on the high seas, will, if

foreign ships are placed in an advantageous position in this regard travel on foreign ships and the American ships will lose a large amount of revenue thereby. Defendants are informed and verily believe that the loss of such revenue from the sales of liquor and from passage money in case of a differential treatment giving preference to foreign ships over American ships in the matter of transportation of intoxicating liquors within the territorial waters of the United States, will be sufficient to make it impossible for the American merchant marine to compete profitably with ships of foreign registry. The majority of the American passenger liners operating in the North Atlantic trade, in competition with complainant's and other foreign vessels are owned and operated directly by the United States Government. Any loss of revenue by reason of a differential treatment favorable to foreign ships will fall directly on the United States Government and its taxpayers.

Wherefore, defendants pray that the amended bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,  
*United States Attorney for the  
 Southern District of New York,  
 Attorney for Defendants.*

Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

31 United States District Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE  
(HENDERSON BROTHERS), LTD.,

against

ANDREW W. MELLON, Secretary of the Treasury of the United  
States, et al.

And Ten Other Cases.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decree upon the answers. The pleadings have been so drawn on both sides as to raise the merits of the controversy, and it is not necessary to set them forth in detail.

The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and liquors as part of their sea-stores. This was done with the consent of the public authorities who promulgated regulations recognizing the practice, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an opinion at that time given by the Attorney General, was that, as part of the ship's stores, these wines and liquors, if sealed and kept on board, were not to be regarded as brought within the country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where the peace of the sovereign is at stake. Later the permission given was further extended to allow the ships to dispense to their crews their customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of *Grogan v. Walker*, and *Anchor Line v. Aldridge*, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration, on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying in and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed to execute the law in accordance with this opinion, and this created the situation out of which these bills arise.

The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in Europe

so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal, and carried out again, only for the entertainment of passengers embarking from the United States. Besides the wines and liquors so used the steamers carry a stock for the use of their crews. In the case of the French, Italian and Belgian ships the law of their flag requires them to supply a ration of wine and in these cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore, the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign lines; they have freely sold their wines and liquors at sea and brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some cases the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the Zone Officer, but the Collector of the Port of New York and the local Prohibition Director are defendants in all.

### 34 Appearances:

Hon. Van Vechten Veedor, for Oceanic Steam Navigation Co. Ltd., Liverpool, Brazil & River Plate Steam Navigation Co., Ltd., United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., The Netherlands American Steamship Co. (Holland America Line), and Pacific Steam Navigation Company.

Lucius H. Beers, Esq., for the Cunard Steamship Co., Ltd., and Anchor Line (Henderson Brothers).

Joseph P. Nolan, Esq., for Compagnie Generale Transatlantique.

Reid K. Carr, Esq., for United American Lines, et al.

Cleatus Keating, Esq. and John H. Woolsey, Esq., for International Mercantile Marine and International Navigation Co., Ltd.

William Hayward, Esq., United States Attorney.

And John Holley Clark, Esq., Assistant U. S. Attorney for Defendants in all cases.

### LEARNED HAND, D. J.:

It is conceded, and indeed could not be disputed, after *Grogan v. Walker and Anchor Line v. Aldridge*, decided May 15, 1922, that the liquors here in question been a part of the ship cargo, the bills would not lie. It makes no difference that they were not to be broached while carried within the territory of the United States; the carriage would be transportation none the less. But because they are part of the ships' stores, in the sense that that term is generally understood, the plaintiffs argue that they do not fall within the same rule. This argument rests upon two alternative premises, first, that

"transportation" involves a place there, and a person to whom, the goods are to be delivered, and second, that a ship's stores have by long custom been treated as a part of the "furniture," *Brough v. Whitmore*, 4 Term R. 206, or "appurtenances," *The Dundee*, 1 Hagg. Adm. 109, of the ship, which do not without particular mention become subject to the municipal law of the ports into which she enters, any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I do not see how that would help the plaintiffs. These liquors are carried for delivery at sea to the passengers and crew, and when so delivered their transportation ends. There appears to be no significant distinction in the fact that the place of delivery is the ship itself. The passengers, and for that matter, the crew, are not the same person as the owner, and if the passage of title or possession has anything to do with the matter, the title to, and possession of, the bottle or the dram, passes when it is handed to its consumer. The carriage within the limits of the Port of New York is a part of a transit whose purpose from the beginning is that very delivery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to search out and coal at sea friendly cruisers during war, as happened in 1914.

Therefore, I might admit the plaintiffs' interpretation of the word, if it were necessary. Nevertheless, it seems to me at best very doubtful whether it carries with it any such limitation. The cases in which the plaintiffs rely come only to this, that the jurisdiction of the United States under the interstate commerce clause does not terminate until delivery after a transit across State lines, *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196, *Rhodes v. Iowa*, 170 U. S. 412, *Louisville & Nashville R. R. v. Cook Brewing Co.*, 223 U. S. 70, *Daneiger v. Cooley*, 248 U. S. 319. From this it doesn't follow that the term, "transportation," as used in this statute, implies delivery to another than the person who carries the liquors.

Suppose, for example, a parcel of liquor, made after the Amendment, and carried off to be laid away in a cache. There can be no question, I believe, that two separate crimes would be committed, "manufacture" and "transportation."

Nor does it seem to me that the thirteenth and fourteenth sections of Title II of the Prohibition Act, help the plaintiffs. Under these, carriers are required to mark the consignor's and consignee's names on the outside of all packages. But it does not follow that a regulation like this of one kind of transportation imputes to the word itself any of the conditions which it enacts. In common use transport means to carry about, and I see no reason why it should mean less in Section three. The law clearly intended by immobilizing liquor to make surreptitious traffic in it impossible and policy would as well cover movements which might be incidental to, as these which immediately terminated in, a delivery to someone else. The case of *Street v. Lincoln Safe Deposit Company*, 254 U. S. 88, did not decide anything to the contrary; turned upon the fact that the possession of the liquor in the leased



room and in the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as Street

had, for the possession of the liquor. I conclude therefore  
37 that the carriage in question is "transportation."

The first point being thus disposed of, I come to the second. It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States, (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they must be manifested and may not be excessive in quantity, as such they are not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbade generally the transportation of liquors, it must be read in the light of this statute and the language of it, and that what is not within the United States for the purposes of customs ought not to be so for purposes of prohibition. In addition they urge that under the maritime law it is held that for most purposes sea-stores will be treated as a part of the ship herself. If so, it is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and let alone a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to the effect. *Brown v. Duchesne*, 19 How. 183, *Taylor v. U. S.*, 207 U. S. 121, *Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122. Nevertheless everyone must agree that the question is no more than one of interpretation, for in the cases at bar Congress certainly might, if it

38 chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

*Grogan v. Walker*, *supra*, and *Anchor Line v. Aldridge*, *supra*, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary change in the habits of the nation, the statute is to be understood as thorough-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left it to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the Amendment, and its very want of particularity is a good index that it meant to cover what it could. For

39 reason it is to be distinguished from earlier local acts of the same kind, as for example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful, since in form it only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the policy, and not the promise, of the nation. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

40 However, the motives for positively assuming that such stores must be considered as included within Section three appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legislative motives is speculative, but that vice, if it be one, is of the plaintiffs' making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitations on that meaning, because of the supposed intent of Congress. Hence, therefore, I am asked to have recourse to implications. I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises. In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan v. Walker*, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the laws runs for

all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of the  
 41 stocks are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question; it must be enough for him that each is forbidden.

42 It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, the question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute such general words should have meant to cover sea stores. This turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the section covers some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress might indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crews' rationing

stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later.

Cases like *Brown v. Duchesne*, supra, *Taylor v. U. S.*, supra, and *Scharrenberg v. U. S.*, supra, are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning of Section three accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is *sui generis*, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages. It is true that the prayers for relief do include so much, but prayers without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs than anything I may think about the law. The power under the Seventy-fourth Rule to grant such an order is undoubted, notwithstanding a dismissal of the bill, *Merrimac River Savings Bank v. City of Clay Center*, 219 U. S. 527, *Stafford v. King*, 90 Fed. R. 136 (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he loses his decree. Like all such matters, it depends upon a balance between the two, and I must now assume that the chances of success are not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some anxiety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far as the loss of the liquors themselves is concerned the damage cannot be said to be irreparable. These must be condemned before they can be forfeited, and in the present state of the calendars the cases at bar will be finally determined long before such libels can be tried. If I

am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to  
 45 allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the long acquiescence of the authorities in the practices here in question will moderate the ultimate penalty of confiscation; I must assume that the plaintiffs will receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as part of the crews' ration. If the ration is cut off, some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages to stay the enforcement of the law against stocks of wine and liquor  
 46 necessary for crews' rations, if honestly kept and dispensed for that purpose alone.

As to the maintenance of passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing inter se and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is easy to say, if one does not take seriously the opinion behind the Amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury which no judge has the right to ignore. The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is.

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge, the plaintiffs have no case. Therefore I will go no further than to issue an injunction against interfering with the carriage of a stock necessary for the crews' rations on the east-bound voyage. The plaintiffs must each give a bond in  
 47 the sum of twenty-five thousand dollars, conditional against the use of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal if the same be taken at once. Settle orders on notice.

— — —, D. J.

October 23, 1922.

48 At a Stated Term of the District Court of the United States for the Southern District of New York held in the Court Rooms thereof, at the Post Office Building, in the Borough of Manhattan, City of New York, on the — day of October, 1922.

Present: Honorable Learned Hand, District Judge.

In Equity.

COMPAGNIE GENERALE TRANSATLANTIQUE, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Order Dismissing Complaint.*

This cause came on to be heard at this term upon motions by the defendants to dismiss the amended bill of complaint and by the plaintiffs for a final decree in their favor on the pleadings, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the amended bill of complaint herein be dismissed and defendants have judgment against the complainants for their costs to be taxed, and it is further

49 Ordered, adjudged and decree that until final hearing of this cause in the Supreme Court of the United States and the entry of an order or decree on the mandate of that Court, the defendants, their servants, agents and subordinates, be and they hereby are stayed and restrained from seizing or interfering with the possession or carriage by complainants herein of a stock of liquors customary for the rations of the crews of complainants' vessels upon eastbound voyages, upon the filing of a bond in the penal sum of twenty-five thousand dollars (\$25,000), conditioned against the gift, issuance or sale of such stock of liquors by complainants otherwise than as crews' rations to the crews of complainants' vessels; and it is further

Ordered, adjudged and decreed that if complainants shall fail to take an appeal herein to the Supreme Court of the United States within five days from the entry hereof, or to move for preference on next motion day, the defendants may move herein to vacate the injunction granted above.

LEARNED HAND,  
U. S. D. J.

- 50 In the District Court of the United States for the Southern District of New York.

COMPAGNIE GENERALE TRANSATLANTIQUE, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

The complainant above named, the Compagnie Generale Transatlantique, a Corporation conceiving itself aggrieved by the order dismissing complaint made and entered in the above entitled cause on the 24th day of October, 1922, does hereby appeal from such order to the Supreme Court of the United States for the reasons specified in the assignments of errors which is filed herewith, from which it appears that the case is appealable directly from this court to the said Supreme Court of the United States under §238 of the Judicial Code and, said, the Compagnie Generale Transatlantique, prays that it be allowed this appeal and that a transcript of the

- 51 record, papers and proceedings, upon which said order dismissing complaint was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, October 24th, 1922.

JOSEPH P. NOLAN,  
*Solicitor for Complainant.*

25 Broad Street, New York City.

Appeal allowed.  
LEARNED HAND.

- 52 United States District Court, Southern District of New York

COMPAGNIE GENERALE TRANSATLANTIQUE, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

Now comes the Compagnie Generale Transatlantique, complainant and appellant, by Joseph P. Nolan its attorney, and makes the following assignments of error:

- First. The Court erred in dismissing the bill of complaint herein.  
Second. The Court erred in denying the petition for an injunction



Third. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States prohibits a foreign ship from keeping on board while on the territorial waters of the United States intoxicating beverages constituting part of the customary sea stores of such — lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fourth. The Court erred in holding that the National Prohibition Act prohibits a foreign ship from keeping on board, while on the territorial waters of the United States, intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the crew as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Sixth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the passengers as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Seventh. That the National Prohibition Act as construed and applied by the District Court is unconstitutional and void because enforcement thereof with respect to sea stores on the complainant's vessels would deprive the complainant of its property and subject it to penalties without due process of law.

Eighth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the "third" and "fourth" assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Ninth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the "Fifth" and "Sixth" assignments of error constitutes

a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Tenth. The Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverages in the circumstances mentioned in the "Third," "Fourth,"  
 55 "Fifth" and "Sixth" assignments of error is prohibited by the Eighteenth Amendment and the National Prohibition Act.

Eleventh. The Court erred in refusing to hold that the interpretation of the National Prohibition Act mentioned in the "Ninth" assignment of error was unconstitutional and invalid and not within the powers conferred by Congress by the Constitution.

Twelfth. That the National Prohibition Act as construed and applied by the District Court is unconstitutional and void because it attempts to exercise jurisdiction over public ships carrying the flag of the Republic of France, and the mails of the Republic of France.

Thirteenth. That the National Prohibition Act, as construed and applied by the District Court is unconstitutional and void because it interferes with, and is a violation of complainant's rights under existing treaties between the United States and France.

JOSEPH P. NOLAN,  
*Solicitor for Complainant.*

56 By the Honorable Learned Hand, One of the Judges of the United States District Court, for the Southern District of New York, in the Second Circuit.

To Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden in the City of Washington, District of Columbia, on the — day of —, 1922, pursuant to the appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein the Compagnie Generale Transatlantique is complainant and appellee and you are defendants appellees, to show cause, if any there be, why the order dismissing complaint in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named the — day of October, in the year of our Lord One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred and Forty-sixth.

57

LEARNED HAND,  
*United States District Judge*

& 59      *Stipulation on Appeal Record.*

United States District Court, Southern District of New York.

Eq. 25—14.

COMPAGNIE GENERALE TRANSATLANTIQUE, Complainant,

vs.

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for  
the State of New York, Defendants.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated Oct. 24, 1922.

JOSEPH P. NOLAN,  
*Attorney for Complainant.*  
WM. HAYWARD,  
*Attorney for Defendants.*

UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

COMPAGNIE GENERALE TRANSATLANTIQUE, Complainant,

vs.

ANDREW W. MELLON, Secretary of the Treasury of the United States,  
et al., Defendants.

Alexander Gilchrist, Jr., Clerk of the District Court of the  
United States of America for the Southern District of New York, do  
hereby Certify that the foregoing is a correct transcript of the record  
of the said District Court in the above-entitled matter as agreed on  
by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this twenty-fourth day of October, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of the District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,  
*Clerk.*

Endorsed on cover: File No. 29,212. S. New York D. C. U. S. Term No. 662. Compagnie Generale Transatlantique, appellant, vs. Andrew W. Mellon, Secretary of the Treasury of the United States et al. Filed October 25th, 1922. File No. 29,212.

(7662)

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

**No. 666.**

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THE NETHERLANDS-AMERICAN STEAM NAVIGATION  
COMPANY (HOLLAND AMERICA LINE), APPELLANT,

vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, ET AL.

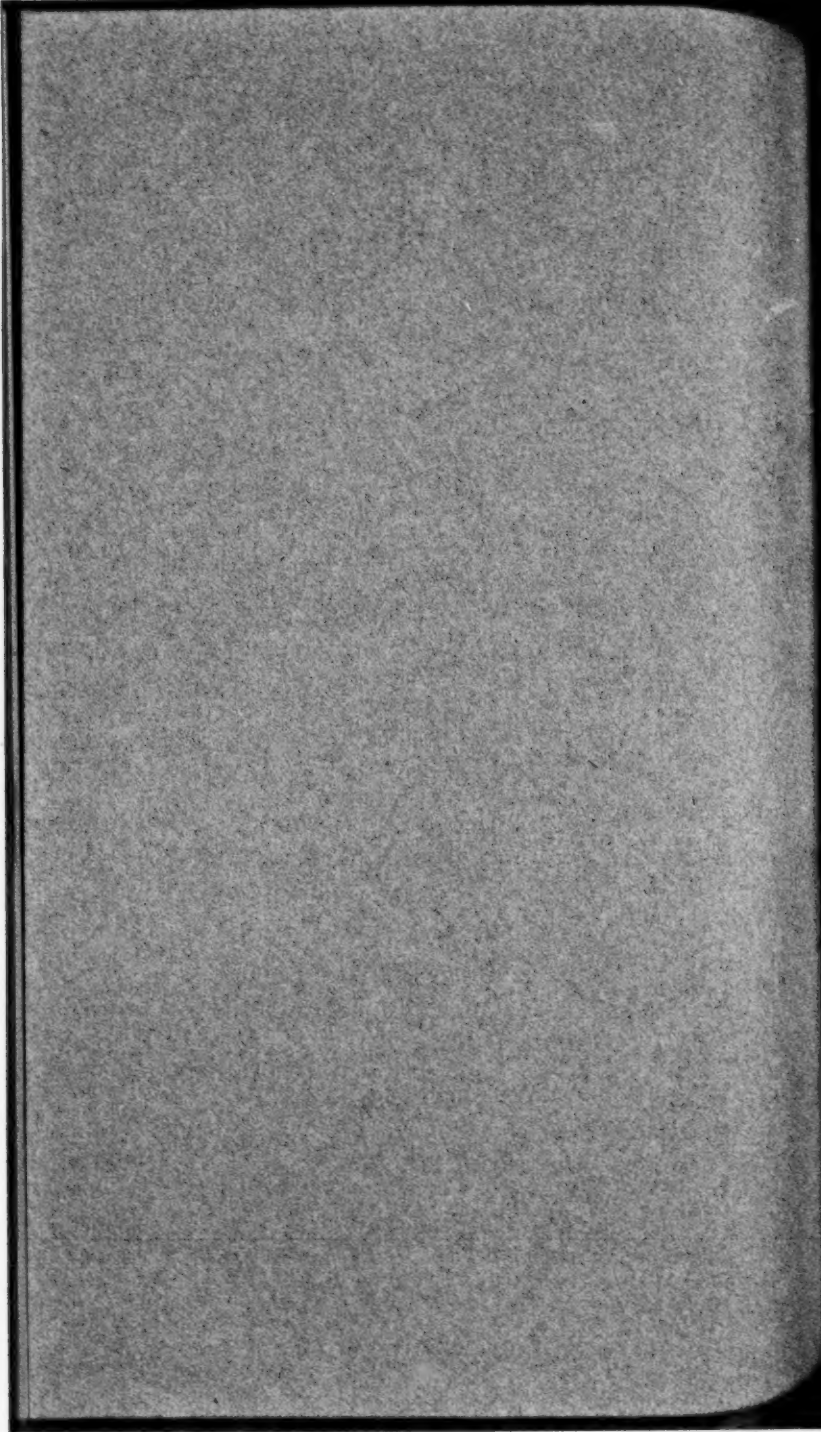
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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FILED OCTOBER 27, 1922.

**(29,216)**



(29,216)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 666.

THE NETHERLANDS-AMERICAN STEAM NAVIGATION  
COMPANY (HOLLAND AMERICA LINE), APPEL-  
LANT,

*vs.*

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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## Office Copy.

*Equity Subpœna.*

The President of the United States of America to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by the Netherlands-American Steam Navigation Company (Holland America Line), and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you, of two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 18th day of October, in the year One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred and forty-seventh.

ALEX. GILCHRIST, JR.,

*Clerk.*

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Complainant's Sol'rs.*

The Defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX. GILCHRIST, JR.,

*Clerk.*

- 2 In the District Court of the United States for the Southern District of New York.

In Equity.

THE NETHERLANDS-AMERICAN STEAM NAVIGATION COMPANY  
(HOLLAND AMERICA LINE), Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Bill of Complaint.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainant, The Netherlands-American Steam Navigation Company (Holland America Line), brings this its Bill of Complaint against the above named defendants and respectfully shows as follows:

I. Complainant, The Netherlands-American Steam Navigation Company (Holland America Line) is a corporation duly organized and existing under the laws of the Kingdom of the Netherlands with its principal place of business in Rotterdam, Holland.

II. Complainant is informed and verily believes and therefor alleges on information and belief:

The defendant, Andrew W. Mellon, is Secretary of the Treasury of the United States and he is, and his subordinates are, by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of the United States and the making of Regulations, promulgated for the purpose of enforcing such Acts of Congress.

3 The defendant, Henry C. Stuart, is a subordinate of the Secretary of the Treasury and is Acting Collector of Customs for the Port of New York, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury, which from time to time may be promulgated, within the Port of New York wherein the complainant desires to bring its vessels equipped with certain sea stores as hereinafter set forth.

The defendant, John D. Appleby, is a citizen and resident of the State of New York and is Zone Officer for this Zone, and said defendant is by law charged with the duty of enforcing the terms and provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury hereinbelow referred to, and has jurisdiction in the Port of New York, both in the States of New York and New Jersey.

III. This is a suit of a civil nature arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three thousand dollars (\$3,000) in value, exclusive of interest and costs.

IV. Complainant is a foreign corporation organized under the laws of the Kingdom of the Netherlands for the purpose of carrying on a steamship business, and for very many years has been engaged in the business of transporting as common carrier, passengers and cargo for hire on the high seas, and in transacting such business the complainant maintains and operates fleets of steamships in over-seas trades between Holland and other foreign countries and ports of the United States.

All of the complainant's steamships are Dutch vessels flying the Dutch flag. The complainant owns ten passenger steamers of a total gross tonnage of 121,271 and thirty-six freight steamers of a total gross tonnage of 247,372. Of these vessels nine passenger steamers of a total gross tonnage of 116,950 make regularly between foreign ports and ports of the United States. Of the freight steamers an average of approximately one-half, or a total gross tonnage of about 120,000, trade between foreign ports and the United States. Said steamers are worth many millions of dollars, and any interruption of their regular services causes great loss and damage to the complainant, the extent of which it is impossible to estimate. Regular passenger services are maintained between New York and Rotterdam via Plymouth, England, and Calcutta, India; also between New Orleans and Rotterdam, via Cuba and Spanish and Belgian ports. Regular freight services are maintained between New York and the Dutch East Indies; also freight services to Holland out of Boston, Philadelphia, Baltimore, Norfolk, Savannah and Galveston; also between United States Pacific ports and Holland, the United Kingdom, Germany and Belgium via the Panama Canal. Complainant's principal office in the United States is located in the City of New York, and it occupies piers in the port of New York at Hoboken. It also has berths and pier accommodations in a number of other ports of the United States.

V. The crews operating complainant's vessels, including those carrying passengers and cargo and those carrying cargo alone, are made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic liquors for beverage purposes is not prohibited and by whose customs the use of alcoholic liquors for beverage purposes is so widespread that complainant believes it would experience the greatest difficulty in obtaining adequate crews to operate their vessels running to the United States, if they were prohibited from furnishing a usual and reasonable amount of liquor to members of the crews.

VI. By local regulations in force as to Dutch vessels, they are required to have on board a certain amount of liquor for medicinal

and emergency use, and there are local requirements effective in several of the countries at which complainant's vessels call also necessitating the maintenance of a supply of liquors on board ship as a condition of trading from such ports.

Among passenger vessels regularly crossing the North Atlantic from European ports are many which land at Canadian ports, and if your complainant is prohibited from furnishing its passengers with alcoholic beverages, it believes a large number of passengers, who would otherwise have patronized complainant's ships, will patronize lines landing at Canadian ports.

A considerable portion of passengers traveling to and from the United States by complainant's ships consists of through passengers from one foreign country to another by way of the United States. As those passengers are largely foreigners, accustomed to the use of wines and liquors with their meals, if complainant is prevented from furnishing wines and liquors to them while on the high seas, it believes they will travel by steamers of other lines not touching at United States ports.

VII. The prohibition of the use of alcoholic liquors on complainant's vessels as sea stores, for the reasonable use of crew and passengers, it is believed would cause your complainant great pecuniary loss by reason of the difficulty of obtaining crews, and would cause an annual loss of receipts from passenger business of many thousands of dollars a year, and will involve irreparable damage to your  
6 complainant, in that it will destroy a considerable part of its business and render a considerable part of its equipment useless and cause a loss of its profits.

VIII. It has at all times heretofore been the practice of complainant's vessels, in common with other Dutch vessels, to carry as part of their sea stores certain wines, liquors and other intoxicating beverages for consumption by the vessel's passengers and crew, such sea stores, including such wines, liquors and other intoxicating beverages, being the property of the complainant and on board solely for such consumption on board and not for transportation or landing in the United States or elsewhere, and upon arrival of any vessel at the United States an accurate list of all such sea stores, including such wines, liquors and other intoxicating beverages, being furnished to the United States authorities. None of the intoxicating liquors so kept as sea stores for reasonable use of passengers and crew have been manufactured, sold or transported within, imported into, or exported from the United States or any territory subject to the jurisdiction of the United States. All wines and other intoxicating liquors kept as sea stores on complainant's vessels as aforesaid have been legally acquired.

Since the adoption of the so-called National Prohibition Act of October 28, 1919, complainant's ships have been permitted freely to come and go in the port of New York and other ports and territorial waters of the United States with such sea stores, including such wines, liquors and other intoxicating beverages, on board, under regulations of the Secretary of the Treasury hereto annexed and

marked Schedules A and B, and reference thereto is prayed. In reliance upon and under the authority of the above mentioned Treasury decision and the regulations promulgated in connection therewith and the procedure always followed as above described, complainant in good faith purchased in foreign ports and now has on board its vessels on the high seas bound for the United States, as sea stores, quantities of intoxicating liquors of a value in excess of Three thousand dollars (\$3,000.). The complainant has at all times been ready and willing to conform to, and has conformed, to such regulations, and upon arrival of any of complainant's vessels within the jurisdiction of the United States such vessel has immediately been boarded by the United States customs officials, who thereupon placed such wines, liquors and other intoxicating beverages under seal and assumed exclusive control thereof until the same were unsealed by such customs officials upon the vessel's again leaving the jurisdiction of the United States.

IX. All of the alcoholic liquors carried as such sea stores on complainant's vessels are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for sea stores is taken on board complainant's vessels at foreign ports, and no part of such liquors is intended to be landed in the United States.

X. On or about October 5, 1922, as complainant is informed and believes, the Attorney General of the United States transmitted an opinion to the Secretary of the Treasury in which, among other things, he stated that the sale, transportation or possession of intoxicating liquors for beverage purposes on foreign vessels while in territorial waters of the United States is prohibited by said National Prohibition Act. Thereafter, the President of the United States directed that said National Prohibition Act be enforced in accordance with said opinion of the Attorney General, and directed the Secretary of the Treasury to proceed to the formulation of regulations for the enforcement of said law in accordance with said opinion of the Attorney General with respect to foreign ships.

Complainant is informed and believes that the defendant, the Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States and threaten to enforce said Prohibition Act as interpreted by the Attorney General. By order of the President of the United States, as complainant is informed and believes, the said regulations will not apply to foreign vessels sailing for the United States on or before October 14. The complainant's passenger steamer Rotterdam, however, sails from Rotterdam, Holland, for the United States on October 17, and others of complainant's vessels will shortly from time to time thereafter be sailing from foreign ports for the United States, and, unless restrained, the de-

defendants intend, as complainant is informed and believes, upon arrival of said vessels within the United States, to seize all wines, liquors or other intoxicating beverages on board and included in the sea stores of said vessels, and threaten also to seize the vessels themselves as being in violation of said National Prohibition Act and subject to the penalties therein provided; and any such seizure of said wines, liquors or other intoxicating beverages constituting part of said sea stores of said vessels for use and consumption of passengers and crews as aforesaid, or seizure of said vessels themselves,

9 will disrupt the sailings of complainant's vessels, prevent the performance of obligations incurred in respect thereof, deprive the complainant of a large volume of patronage, and otherwise cause loss, damage and difficulties to the complainant, to its great and irreparable loss and injury, and will deprive complainant of its property without due process of law.

XI. Complainant is advised by counsel, and verily believes, that the aforesaid ruling by the Attorney General in respect to foreign ships carrying intoxicating beverage liquors as ships' stores for crew or passengers as aforesaid, and any regulations formulated by the Secretary of the Treasury for the enforcement of such ruling, are and will be unauthorized and void because neither the Eighteenth Amendment nor the National Prohibition Act prohibits the carriage of such liquors as such sea stores for crew and passengers as aforesaid, and an interference with the carriage of such sea stores would, therefore, violate complainant's rights under the law and under existing treaties between the United States and the Kingdom of the Netherlands.

XII. Complainant is advised by counsel and verily believes, that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders said Act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional and also would deprive complainant of its property without due process of law.

XIII. Complainant alleges that the defendant, Andrew W. Mellon, or his subordinates, are preparing regulations, and that pursuant to said opinion of the Attorney General or such regulations, the defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart and John D. Appleby, are threatening, notwithstanding the fact that the interpretation of the Act of Congress, known as the National Prohibition Act, by the Attorney General is erroneous, unauthorized and void and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said



National Prohibition Act, if it purports to prohibit the carriage of said alcoholic beverages as sea stores for crew and passengers, is unconstitutional and void for the reasons hereinabove stated, to seize said alcoholic liquors not constituting sea stores on complainant's vessels, and to enforce against the complainant, its officers, agents and servants, various pains and penalties, including fines and imprisonment, and various forfeitures of property provided by the Acts of Congress and regulations, and thus involve the complainant, its officers, agents and servants in numerous suits and by such threats to prevent complainant, its employees and servants, from carrying out its contracts, and thus deprive the complainant of its business and of its property without due process of law; all to the irreparable damage of complainant, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainant would be involved in numerous suits if it were forced to bring an action at law to relieve its employees and property from such penalty and forfeiture.

Forasmuch, therefore, as complainant is without remedy in the premises, except in a court of equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled, it respectfully prays that the above named defendants and each of them

11 be directed to make a full, true and perfect answer to this bill of complaint, but not under oath, an answer under oath being expressly waived, and that said defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainant, its officers, servants and employees, or any of them, or complainant's steamships, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General, and from arresting and prosecuting the complainant, its officers, agents, servants or employees, or any of them, and from refusing to issue to the complainant and/or its steamer permits for clearance from the port of New York, or in any way interfering with the arrival or departure of the complainant's steamers, for or on account of any alleged violation by them, or any of them, or on account of any alleged violation by them, or any of them, of the Eighteenth Amendment, or the National Prohibition Act, on the ground or claim that the carriage or possession of said intoxicating liquors as aforesaid as sea stores for crew and passengers is contrary to law; or from molesting or otherwise interfering with the complainant in the peaceful possession of said intoxicating liquors on board such vessels as part of their sea stores.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause, whereby the defendants, their agents, servants, subordinates and employees, and each and every one of them be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

- 12 Complainant further prays that a writ of subpoena be issued herein directed to said defendants, commanding them on a day set, to appear and answer the Bill of Complaint herein.

THE NETHERLANDS-AMERICAN STEAM  
NAVIGATION CO.,  
By W. VAN DOORN,  
*Agent.*

BURLINGHAM, VEEDER, MASTERN &  
FEAREY,  
*Solicitors for Complainant.*

27 William Street, Borough of Manhattan, New York City.

13

## SCHEDULE A.

(Copy.)

(T. D. 38218.)

## Sea Stores—Liquors.

Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 106 and 107 of the Customs Regulations of 1915 as amended.

Treasury Department, December 11, 1919.

To collectors of customs and others concerned:

All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officer from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same Line or owner.

Articles 106 and 107 of the Customs Regulations of 1915 as amended accordingly.

(Signed)

JOUETT SHOUSE,  
*Assistant Secretary*

(99623.)

14

SCHEDULE B.

(Copy.)

(T. D. 38248.)

Sea Stores—Liquors.

Opinion of the Attorney General with respect to the practice under T. D. 38218 of sealing liquors listed as sea stores on vessels while in ports of the United States. Distinction made between American and foreign vessels. T. D. 38218 amended.

Treasury Department, January 27, 1920.

To Collectors of Customs and Others Concerned:

Attention is invited to the appended copy of an opinion rendered by the Department by the Attorney-General with respect to the practice under T. D. 38218 of sealing liquors carried as sea stores on all vessels while in the ports of the United States, as indicated by the questions submitted to him.

Following the opinion of the Attorney-General the first paragraph of T. D. 38218 is hereby amended to read as follows:

All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on foreign vessels should be sealed on arrival of the vessel in port, and such portions thereof released from time to time for use by the officers and crew.

The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification.

JOUETT SHOUSE,

*Assistant Secretary.*

(198377.)

STATE OF NEW YORK.

*County of New York, ss:*

Willen Van Doorn being duly sworn, says: I am the managing agent at New York for the Netherlands-American Steam Navigation Company. I have read the foregoing bill of complaint and know the contents thereof and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and the grounds of my belief as to all matters in said bill of complaint not stated to be on my knowledge are an examination of docu-

ments and other papers in my possession relating to the subject matter of this suit. The reason why this verification is not made by the complainant is that it is a foreign corporation.

W. VAN DOORN.

Sworn to before me this 10th day of October, 1922.

[SEAL.]

WARREN H. LEAKE,  
Notary Public, Kings Co., N. Y.

Certificate filed in N. Y. Co.

My commission expires March 30, 1924.

17 & 18 SIR:

Take notice that the original B/Complt. of which the within is a copy, was this day duly filed herein in the office of the clerk of this court

Dated, New York, 10-19-22.

Yours, etc.,

BURLINGHAM, VEEDER, MASTEN &  
FEAREY, Proctors for —.

27 William Street, Borough of Manhattan, New York City.

To — — —, Proctor for —.

[Endorsed:] District Court of the United States, Southern District of New York. The Netherlands-American Steam Navigation Company (Holland America Line), Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants. Copy B/Complaint of Complainant. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City. A copy of the within paper has been this day received at this office, Oct. 19, 1922. William Hayward, U. S. Attorney.

19 U. S. District Court, Southern District of New York.

E. 25/29.

THE NETHERLANDS-AMERICAN NAVIGATION COMPANY (HOLLAND AMERICAN LINE, Complainant,  
versus

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and John D. Appleby, Chief Zone Officers, Defendants.

*Notice of Appearance and Demand.*

You will please take notice that I am retained by, and appear attorney for, the Defendants in this action, and demand service of

copy of the complaint and all papers in this action upon me, at my office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours,

WILLIAM HAYWARD,  
*United States Attorney,  
Attorney for Defendant.*

New York, October 20, 1922.

To Messrs. Burlingham, Veeder, Masten & Fearey, 27 William Street, Attorney- for Plaintiff.

20 & 21 [Endorsed:] U. S. District Court, Southern District of New York. The Netherlands-American Navigation Company (Holland-American Line) versus Andrew W. Mellon, et al. Notice of Appearance. William Hayward, United States Attorney, Attorney for Defendant. Due service of a copy of the within Notice is herby admitted. Dated the 20 day of Oct., 1922. — — —, Plaintiff's Attorney. To Messrs. Burlingham, Veeder, Masten & Fearey, 27 William Street, Plaintiff's Attorney-.

22 In the District Court of the United States for the Southern District of New York.

E. 25-29.

THE NETHERLANDS-AMERICAN STEAM NAVIGATION COMPANY (HOLLAND-AMERICA LINE), Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Answer to Bill of Complaint.*

Now come the defendants herein and in answer to the bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the bill of complaint herein and every part thereof be dismissed, and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.
2. The Court has no jurisdiction to grant the relief prayed for or any part thereof.
3. The bill does not present a cause of action in equity under the Constitution of the United States.

4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

23 5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

6. It appears from the bill that the complainant has a plain adequate and complete remedy at law.

Second. In answer to the allegations set out in paragraph seven of the complaint the defendants allege on information and belief that any difficulty which complainant might experience in obtaining adequate crews from among the nationals of countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread would be readily obviated by the payment of higher wages to said crews. Defendants are further informed and believe that many of the vessels of the American Merchant Marine carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages and that the said American vessels have never had the least difficulty in obtaining adequate crews from the nationals of such countries at the same wages paid to American crews.

Third. Defendants deny the allegations contained in paragraph eleventh of the bill of complaint that the ruling by the Attorney General referred to in said paragraph is and any regulations for the enforcement of such ruling are and will be unauthorized and void. Defendants further deny the allegation that such ruling and such regulations would violate complainant's rights under existing treaties between the United States, Great Britain and otherwise.

Fourth. Defendants deny the allegation contained in paragraph twelfth of the bill of complaint that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is correct, it renders said Act unconstitutional and void for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional. The defendants allege on the other hand that it is well within the powers of Congress delegated to it by the Eighteenth Amendment to the Constitution of the United States to declare the possession of intoxicating liquor to be unlawful and that such legislative declaration contained in the National Prohibition Act is a valid exercise of the legislative power and has a reasonable relation to the enforcement of the constitutional mandate.

For a separate and distinct defense herein, defendants allege:

Fifth. Defendants re-allege and re-affirm as part of this separate and distinct defense each and every allegation contained in paragraphs First to Fourth above.

Sixth. Defendants are informed by their attorney and therefore allege that if the complainant is correct in its construction of the National Prohibition Act the implications involved are exceedingly serious and the claim of the complainant, if allowed, would carry with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States.

Seventh. Defendants are further informed and believe and therefore allege that for two years last past a large and profitable business has been carried on by divers persons with the object and result of importing liquor into this country contrary to law; that the vessels used by such persons are vessels under foreign registry and such vessels sail from foreign ports with clearance papers, showing that they are bound for other foreign ports. The actual destination of such vessels is not the port shown in their clearance papers but some point on the high seas near the coast of the United States from which its liquors are transferred to smaller boats which complete the smuggling and importation of the liquor into the United States. Up to the present time the vigilance of the customs officials in seizing such vessels when they came within the territorial limits of the United States has somewhat mitigated the evils of this traffic but if, as complainant contends it is only necessary to put liquors under lock and key to make such transportation legal and foreign vessels can sail our territorial waters at will with cargoes of liquor, the enforcement of the prohibition against the importation of liquors, already difficult, will become practically impossible.

Eighth. The rulings of the Secretary of the Treasury referred to in the bill of complaint have already been used as a cloak to hide smuggling operations and if the doctrine underlying such rulings is declared to be the law as claimed by complainant, defendants verily believe that its use as a cloak for such operation will greatly increase. As an instance of the use of such regulations to hide smuggling defendants allege that on or about January 15, 1920, the British passenger steamship Harbinger sailed from Halifax, N. S., for Havana, Cuba, carrying with her a large quantity of intoxicating liquors listed as sea stores. The said vessel came into the port of Portland, Maine, alleging a shortage of coal, and there liquor was sealed under customs seals. Her Master protested her innocence and claimed the right as a foreign vessel to transport intoxicating liquors as sea stores under seal within the territorial waters of the United States. This right was accorded her under the Treasury rulings until recently in force and on which complainant has relied until now. Being under suspicion, however, the Harbinger was convoyed by the coastguard cutter Occipce to Cape Ann whence she entered the port of Boston and thence proceeded without convoy to the neighborhood of New York where she was met by the coastguard cutter Gresham which convoyed her to New York. On January 26th, she was convoyed down New York Bay by the coastguard cutter Manhattan to Dunham Shipyard, Staten Island. There she remained under customs surveillance until February 6th when the



customs seals on the liquors were broken by the crew and an attempt was made to import them into the United States. When such attempt was made the crew of said vessel were arrested. Two have pleaded guilty to a violation of the Prohibition Act and the vessel has been libelled by the Government. After the crew were arrested it became evident that the journey of this vessel down the coast of the United States was not, as alleged and as appeared, because of insufficient coal-carrying space but for the purpose of finding purchasers of the liquor carried as sea stores.

Ninth. Defendants further allege that under the regulations of the Secretary of the Treasury referred to in the complaint herein, customs officers have made no physical inventory of the stores of liquors on any foreign ships either upon their arrival in the  
 27 ports of the United States or upon their leaving such ports. Permission has been given to remove certain of the liquors under seal for the purposes of rations given to the crews, but no record is kept of the amount of liquor which actually leaves United States ports on foreign vessels, nor is any inventory returned by such foreign vessels of the amount of liquors actually found when seals are broken by the ship's agents after leaving port.

Tenth. Defendants are informed and verily believe that the complainant makes large profits from the sale of intoxicating liquors on the high seas, such profits amounting to many thousand dollars per annum and further allege that loss of such profit is the only definitely ascertainable loss which the complainant will suffer if the National Prohibition Act as interpreted by the ruling of the Attorney General is given full force and effect.

Eleventh. Defendants further allege on information and believe that the sale of intoxicating liquors on the high seas by vessels carrying the American flag ceased with the issuance of the ruling of the Attorney General and is not now carried on. And defendants verily believe that if vessels of foreign registry are by the injunction of the Court facilitated in the sale of liquor on the high seas by being allowed to transport liquor within the territorial waters of the United States, the resultant damage to the American merchant marine will be great and irreparable. Not only will ships of the American merchant marine suffer the loss of revenue which they have hitherto enjoyed from the sale of intoxicating liquors on the high seas and which ships of foreign nations will continue to enjoy if the prayer of the complainant herein is granted, but defendants believe that  
 28 a large number of passengers who would otherwise travel on American ships and who would travel on American ships both American ships and foreign ships were placed in the same position in regard to the sale of liquor on the high seas, will, if foreign ships are placed in an advantageous position in this regard trade on foreign ships and the American ships will lose a large amount of revenue thereby. Defendants are informed and verily believe that the loss of such revenue from the sales of liquor and from passengers

money in case of a differential treatment giving preference to foreign ships over American ships in the matter of transportation of intoxicating liquors within the territorial waters of the United States, will be sufficient to make it impossible for the American merchant marine to compete profitably with ships of foreign registry. The majority of the American passenger liners operating in the North Atlantic trade, in competition with complainant's and other foreign vessels are owned and operated directly by the United States Government. Any loss of revenue by reason of a differential treatment favorable to foreign ships will fall directly on the United States Government and its taxpayers.

Wherefore, defendants pray that the bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,  
*United States Attorney for the Southern  
District of New York, Attorney for  
Defendants.*

Office and P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

29 United States District Court, Southern District of New York.

NETHERLANDS AMERICAN STEAMSHIP COMPANY (HOLLAND-AMERICA LINE), Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Stipulation.*

The above entitled suit having been duly brought on for trial by consent of the parties, at a Stated Term of the United States District Court for the Southern District of New York, before the Honorable Learned Hand, District Judge, and a motion for a judgment on the pleadings having been made by the complainant, and the Court having heretofore, at a Stated Term thereof, held at the United States Post Office Building in the City of New York on the 17th day of October, 1922, before the Honorable Learned Hand, heard extended argument of counsel upon a similar motion in like suits by the Oceanic Steam Navigation Company, Ltd., and other complainants, involving similar questions;

It is stipulated that the said motion for judgment in the above entitled suit be, and the same hereby is, forthwith submitted with-

- 30 out further argument for consideration and decision by the Court, along with said suits of the Oceanic Steam Navigation Company, Ltd., and other complainants.

Dated, New York, October 19th, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

WILLIAM HAYWARD,

*United States Attorney for the Southern District of  
New York, Solicitor for Defendants.*

- 31 & 32 [Endorsed:] E 25-29. District Court of the United States, Southern District of New York. Netherlands American Steamship Company (Holland America Line), Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States et al., Defendants. Copy. Stipulation. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

- 33 In the District Court of the United States for the Southern District of New York.

NETHERLANDS AMERICAN STEAMSHIP COMPANY (HOLLAND AMERICAN LINE), Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States  
Henry C. Stuart, Acting Collector of Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

### *Restraining Order.*

A motion having been made in the above entitled case for judgment on the pleadings, and by agreement between the parties submitted to the Court for determination, along with a similar motion made in the suit of The Oceanic Steam Navigation Company, Limited, against Andrew W. Mellon, and others, it is, on motion of Burlingham, Veeder, Masten & Fearey, Solicitors for the complainant,

Ordered that until the determination of said motion by entry of order thereon, the defendants, their successors, agents, servants and subordinates, and each of them, be, and hereby are, restrained from seizing, disturbing, removing or in any way interfering with wines, liquors or other intoxicating beverages on board complainant's ships, as sea stores or medicines, as more particularly set forth in the bill of complaint herein; from seizing, disturbing or in any way interfering with the complainant's ships by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages, as more particularly set forth in said bill of complaint; and from enforcing or attempting to enforce, or causing to be enforced against the complainant, its officers, agents or servants, or

of them, or any of its steamships, any of the pains, penalties or forfeitures provided in and by the so-called National Prohibition Act enacted by Congress pursuant to the Eighteenth Amendment to the Federal Constitution; and from refusing to issue to complainant, or its steamers, permits for clearance from the Port of New York, or in any way interfering with the arrival or departure of any of the complainant's steamers, by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages, as said ship's stores, as more particularly set forth in the bill of complaint herein; and on like motion, it is further

Ordered that service of a copy of this order on the United States Attorney for the Southern District of New York shall be sufficient. Dated, New York, October 21st, 1922.

LEARNED HAND,  
*United States District Judge.*

[Endorsed:] E. 25-29. District Court of the United States, Southern District of New York. Netherlands American Steamship Company (Holland American Line) Complainant vs. Andrew W. Mellon and others Defendants. Copy restraining order. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

Sir: Take notice that the original of which the within is a copy, was this day duly filed herein in the office of the clerk of this Court. Dated, New York, Oct. 21, 1922. Yours, etc. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City. To Proctor for —.

United States District Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HEN-  
DERSON BROTHERS), LTD.,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States,  
et al.,

And Ten Other Cases.

*Opinion.*

Oct. 23, 1922.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decrees upon the answers. The pleadings have been so drawn on both sides as to raise the merits of the controversy, and it is not necessary to set them forth in detail. The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the

Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and liquors as part of their sea-stores. This was done with the consent of the public authorities who promulgated regulations recognizing this practice, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an opinion at that time given by the Attorney General, was that, as part of the ship's stores, these wines and liquors, if sealed and kept on board, were not to be regarded as brought within the country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where the peace of the sovereign is at stake. Later the permission so given was further extended to allow the ships to dispense to their crews their customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of *Grogan v. Walker*, and *Anchor Line v. Aldridge*, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration, on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying in and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed to execute the law in accordance with this opinion, and this created the situation out of which these bills arise.

The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in Europe so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal, and carried out again, only for the entertainment of passengers embarking from the United States. Besides the wines and liquors so used on steamers carry a stock for the use of their crews. In the case of

French, Italian and Belgian ships the law of their flag requires them to supply a ration of wine and in those cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore, the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign lines; they have freely sold their wines and liquors at sea and brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some

the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the Zone Officer, but the Collector of the Port of New York and the local Prohibition Director are defendants in all.

Appearances:

Hon. Van Vechten Veeder, for Oceanic Steam Navigation Co., Ltd., Liverpool, Brazil & River Plate Steam Navigation Co., Ltd., United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., The Netherlands American Steamship Co., (Holland America Line) and Pacific Steam Navigation Company.

Lucius H. Beers, Esq., for the Cunard Steamship Co., Ltd., and Anchor Line (Henderson Brothers).

Joseph P. Nolan, Esq., for Compagnie Generale Transatlantique. Reid L. Carr, Esq., for United American Lines, et al.

Cleatus Keating, Esq. and John M. Woolsey, Esq., for International Mercantile Marine and International Navigation Co., Ltd.

William Hayward, Esq., United States Attorney and John Holley Clark, Esq., Assistant U. S. Attorney, for Defendants in all cases.

LEARNED HAND, D. J.:

It is conceded, and indeed could not be disputed, after *Grogan Walker and Anchor Line v. Aldridge*, decided May 15, 1922, that had the liquors here in question been a part of the ships' cargo, the bills would not lie. It makes no difference that they were not to be broached while carried within territory of the United States; the carriage would be transportation none the less. But because they are part of the ships' stores, in the sense that that term is generally understood, the plaintiffs argue that they do not fall within the same rule. This argument rests upon two alternative premises, first, that "transportation" involves a place where, and a person to whom, the goods are to be delivered, and second, that a ship's stores are by long custom been treated as a part of the "furniture." Brough *Whitmore*, 4 Term R. 206, or "appurtenances." The *Dundee*, 1 Agg. Adm. 109, of the ship, which do not without particular mention become subject to the municipal law of the ports into which they enter, any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I do not see how that would help the plaintiffs. These liquors are tried for delivery at sea to the passengers and crew, and when delivered their transportation ends. There appears to me no significant distinction in the fact that the place of delivery is the ship itself. The passengers, and for that matter, the crew, are not the same person as the owner, and if the passage of title or possession has anything to do with the matter, the title to, and possession of, the bottle or the dram, passes when it is handed to its consumer. The carriage within the limits of the Port of New York is a part of a transit whose purpose from the beginning is that very delivery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to

search out and coal at sea friendly cruisers during war, as happened in 1914.

Therefore, I might admit the plaintiffs' interpretation of the word if it were necessary. Nevertheless, it seems to me at best very doubtful whether it carries with it any such limitation. The cases in which the plaintiffs rely come only to this, that the jurisdiction of the United States under the interstate commerce clause does not terminate until delivery after a transit across State lines, *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196, *Rhodes v. Iowa*, 170 U. S. 412, *Louisville & Nashville R. R. v. Cook Brewing Co.*, 223 U. S. 70, *Danciger v. Cooley*, 248 U. S. 319. From this it does not follow that the term "transportation," as used in this statute, implies delivery to another than the person who carries the liquors. Suppose, for example, a parcel of liquor, made after the Amendment, and carried off to be laid away in a cache. There can be no question, I believe, that two separate crimes would be committed, "manufacture" and "transportation."

Nor does it seem to me that the thirteenth and fourteenth sections of Title II of the Prohibition Act, help the plaintiffs. Under these carriers are required to mark the consignor's and consignee's names on the outside of all packages. But it does not follow that a regulation like this of one kind of transportation imputes to the word itself any of the conditions which it enacts. In common use to transport means to carry about, and I see no reason why it should mean less in Section three. The law clearly intended by immobilizing liquor

to make surreptitious traffic in it impossible and its police would as well cover movements which might be incidental as those which immediately terminated in, a delivery to some one else. The case of *Street v. Lincoln Safe Deposit Company*, 25 U. S. 88, did not decide anything to the contrary; it turned upon the fact that the possession of the liquor in the leased room and the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the cases at bar is to be the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as *Street* had, for the possession of the liquor. I conclude therefore that the carriage in question "transportation."

The first point being thus disposed of, I come to the second. is a very plausible argument to say that ship's stores ought not fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States, (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they may be manifested and may not be excessive in quantity, as such they are not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbade generally the transportation of liquors, it



be read in the light of this statute and the long usage under it, and that what is not within the United States for the purposes of customs ought not to be so for purposes of prohibition. In addition they urge that under the maritime law it is held that for most purposes sea-stores will be treated as a part of the ship herself. If she is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and least of all a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to these, *Brown v. Duchesne*, 19 How. 123, *Taylor v. U. S.*, 207 U. S. 120, *Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122. Nevertheless, everyone must agree that the question is no more than one of interpretation, for in the cases at bar Congress certainly might, if it chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

*Grogan v. Walker*, supra, and *Anchor Line v. Aldridge*, supra, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thorough-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the Amendment, and its very want of particularity is a good index that it meant to cover what it could. For this reason it is to be distinguished from earlier local acts of the same kind, as for example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Then assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful, since to form it only exempted them from customs duties, at least it must

be conceded that the statute, old as it is, represented only the policy, and not the promise, of the nation. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

45 However, the motives for positively assuming that such stores must be considered as included within Section three appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legislative motives is speculative, but that vice, if it be one, is of the plaintiffs' making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitations on that meaning, because of the supposed intent of Congress. Since, therefore, I am asked to have a recourse to implications, I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises.

In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan v. Walker*, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the law runs for all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of the stock

46 are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of the

pensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question; it must be enough for him that each is forbidden.

47 It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the action covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crews' rations stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later.

Cases like *Brown v. Duchesne*, *supra*, *Taylor v. U. S.*, *supra*, and *Scharrenberg v. U. S.*, *supra*, are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning of Section three accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is *sui generis*, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages.

It is true that the prayers for relief do include so much, but prayers without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs than anything I may think about the law. The power under-  
 49 the Seventy-fourth Rule to grant such an order is undoubted, notwithstanding a dismissal of the bill, *Merriam River Savings Bank v. City of Clay Center*, 219 U. S. 527, *Staffords v. King*, 90 Fed. R. 136 (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he holds his decree. Like all such matters, it depends upon a balance between the two, and I must assume that the chances of success are not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some nicety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far as the loss of the liquors themselves is concerned the damage cannot be said to be irreparable. There must be condemned before they can be forfeited, and in the present state of the calendars the cases at bar will be finally determined long before such libels can be tried. If I am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the long acquiescence of the authorities in the practices here in question will moderate the ultimate penalty of confiscation; I must assume that  
 50 the plaintiffs will receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as part of the crews' ration. If the ration is cut off some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages

stay the enforcement of the law against stocks of wine and liquor necessary for crews' rations, if honestly kept and dispensed for that purpose alone.

As to the maintenance of Passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing inter se and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is easy to say, if one does not take seriously the opinion behind the Amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury which no judge has the right to ignore. The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is.

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge the plaintiffs have no case. Therefore I will go no further than to issue an injunction against interfering with the carriage of a stock necessary for the crews' rations on the east-bound voyage. The plaintiffs must each give a bond in the sum of twenty-five thousand dollars, conditional against the use of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal if the same be taken at once. Settle orders on notice.

LEARNED HAND,  
D. J.

October 23, 1922.

52 At a Stated Term of the District Court of the United States for the Southern District of New York Held in the Court Rooms Thereof, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 25th Day of October, 1922

Present: Hon. Learned Hand, District Judge.

THE NETHERLANDS-AMERICAN STEAM NAVIGATION COMPANY (HOLLAND AMERICA LINE), Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Final Decree.*

October 25, 1922.

This cause came on to be heard at this term upon motions by the defendants to dismiss the bill of complaint and by the complainant for a final decree in its favor on the pleadings, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the bill of complaint herein be dismissed and defendants have judgment against the complainant for their costs to be taxed, and it is further.

Ordered, adjudged and decreed that until final hearing of this cause in the Supreme Court of the United States and the entry of an order or decree on the mandate of that Court, the defendants, their servants, agents and subordinates, be and they hereby are stayed and restrained from seizing or interfering with the possession or carriage by complainant herein of a stock of liquors customary for the rations of the crews of complainant's vessels upon each east bound voyage, upon the filing of a bond in the penal sum of twenty-five thousand dollars (\$25,000), conditioned against the gift, issuance or sale of such stock of liquors by complainant otherwise than as crews' rations to the crews of complainant's vessels and it is further

Ordered, adjudged and decreed that if complainant shall fail to take an appeal herein to the Supreme Court of the United States within five days from the entry hereof, or to move for preference on the first motion day of the Supreme Court, the defendants may move herein to vacate the injunction granted above.

LEARNED HAND,

U. S. D. J.

54 & 55 [Endorsed:] E. 25-29. District Court of the United States, Southern District of New York. The Netherlands American Steam Navigation Company (Holland America Line) Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of the

Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants. Copy. Final Decree. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

56 In the District Court of the United States for the Southern District of New York.

THE NETHERLANDS-AMERICAN STEAM NAVIGATION COMPANY  
(HOLLAND AMERICA LINE), Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Assignment of Errors.*

The complainant hereby assigns error in the final judgment or decree of the District Court herein entered October 25th, 1922, in the following respects:

First. The Court erred in dismissing the bill of complaint herein.

Second. The Court erred in denying the petition for an injunction.

Third. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States prohibits a foreign ship from keeping on board while on the territorial waters of the United States intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fourth. The Court erred in holding that the National Prohibition Act prohibits a foreign ship from keeping on board, while on the territorial waters of the United States, intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the crew as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.



Sixth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the passengers as part of their customary rations by the law of the ship, flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Seventh. That the National Prohibition Act as construed and applied by the District Court is unconstitutional and void because enforcement thereof with respect to sea stores on the complainant's vessels would deprive the complainant of its property and subject it to penalties without due process of law.

Eighth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the third and fourth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Ninth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the fifth and sixth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Tenth. The Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverages in the circumstances mentioned in the third, fourth, fifth and sixth assignments of error is prohibited by the Eighteenth Amendment and the National Prohibition Act.

Eleventh. The Court erred in refusing to hold that the interpretation of the National Prohibition Act mentioned in the ninth assignment of error was unconstitutional and invalid and not within the powers conferred by Congress by the Constitution.

Wherefore complainant-appellant prays that said decree or judgment of the United States District Court for the Southern District of New York be reversed and an injunction granted the complainant as prayed for in the bill of complaint herein, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
*Solicitors for Complainant.*

59 & 60 [Endorsed:] E. 25-29. District Court of the United States, Southern District of New York. The Netherlands-American Steam Navigation Company (Holland America Line), Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants. Copy. Assignment or Errors. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

61 In the District Court of the United States for the Southern District of New York.

THE NETHERLANDS-AMERICAN STEAM NAVIGATION COMPANY  
(HOLLAND AMERICA LINE), Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Petition for Appeal and Allowance.*

The complainant above named, The Netherlands-American Navigation Company (Holland America Line), conceiving itself aggrieved by the final judgment and decree entered herein October 25th, 1922, does hereby appeal from said final judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, from which it appears that this cause is appealable directly from this court to the said Supreme Court under Section 238 of the Judicial Code, and said The Netherlands-American Steam Navigation Company (Holland America Line) prays that it be allowed this appeal and that a transcript of the record papers and proceedings upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEARY,  
*Solicitors for Complainant.*

The foregoing appeal is hereby allowed as prayed for.  
LEARNED HAND,  
U. S. D. J.

To Hon. William Hayward, United States Attorney; Alexander  
Glechrist, Jr., Esq., Clerk, United States District Court, Southern  
District of New York.

62 & 63 [Endorsed:] District Court of the United States, Southern District of New York. Netherlands American Steam Navigation Company (Holland America Line), Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Petition for Appeal. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

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*Citation on Appeal.*

By the Honorable Learned Hand, One of the United States District Judges for the Southern District of New York, in the Second Circuit.

To Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at Washington, in the District of Columbia on the 20th day of November, 1922, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein The Netherlands-American Steam Navigation Company (Holland America Line) is complainant and you are defendants to show cause, if any there be, why the decree in said cause mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 25th day of November, in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

LEARNED HAND,

*United States Judge for the Southern District  
of New York, in the Second Circuit.*

[Endorsed:] E. 25-29. United States District Court, Southern District of New York. The Netherlands American Steam Navigation Company (Holland America Line), complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Citation. Burlingham, Veeder, Masten & Fearey, solicitors for Complainant, 27 William Street, Borough of Manhattan, City of New York.

65 In the District Court of the United States for the Southern District of New York.

THE NETHERLANDS-AMERICAN STEAM NAVIGATION COMPANY (HOLLAND AMERICA LINE), Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Stipulation.*

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of said District Court in the above entitled matter as agreed on by the parties.

Dated New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

WM. HAYWARD,

*U. S. Atty., Attorney for Defendants.*

66 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

THE NETHERLANDS-AMERICAN STEAM NAVIGATION COMPANY (HOLLAND AMERICA LINE), Complainant,

vs.

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 25th day of October in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of the District Court of the United States, Southern District of N. Y.]

ALEX GILCHRIST, JR.,  
*Clerk.*

Endorsed on cover: File No. 29,216. S. New York D. C. U. S. Term No. 666. The Netherlands-American Steam Navigation Company (Holland America Line), appellant, vs. Andrew W. Mellon, Secretary of the Treasury of the United States, et al. Filed October 27th, 1922. File No. 29,216.

(7602)

**TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1922.**

**No. 667.**

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**LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVI-  
GATION COMPANY, LIMITED, APPELLANT,**

**vs.**

**ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, ET AL.**

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.**

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**FILED OCTOBER 27, 1922.**

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 667.

LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVI-  
GATION COMPANY, LIMITED, APPELLANT,

vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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## Office Copy.

*Equity Subpœna.*

The President of the United States of America to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Liverpool, Brazil and River Plate Steam Navigation Company, Ltd., and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you, of two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 19th day of October, in the year One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred and forty-seventh.

ALEX GILCHRIST, JR.,  
*Clerk.*

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
*Complainant's Sol'rs.*

The Defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX GILCHRIST, JR.,  
*Clerk.*

2 In the District Court of the United States for the Southern District of New York.

In Equity.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY  
LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York; Ralph A. Day, Federal Prohibition Director for the  
State of New York, and John D. Appleby, Chief Zone Officer, De-  
fendants.

*Bill of Complaint.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainant, Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., brings this its bill of complaint against the above named defendants, and respectfully shows as follows:

I. Complainant, Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., is a corporation duly organized and existing under the laws of Great Britain and Ireland, with its principal place of business in England.

II. Complainant is informed and verily believes and thereon alleges on information and belief:

The defendant Andrew W. Mellon is Secretary of the Treasury of the United States, and he is, and his subordinates are, by law charged with the duty of enforcing the terms and provisions of the

Acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of the United States and the making of Regulations, promulgated for the purpose of enforcing such acts of Congress.

The defendant Henry C. Stuart is a subordinate of said Secretary of the Treasury and is Acting Collector of Customs for the Port of New York, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury, which from time to time may be promulgated, within the Port of New York wherein the complainant desires to bring its vessels equipped with certain sea stores as hereinafter set forth.

The defendant Ralph A. Day is a subordinate of the said Secretary of the Treasury and is the Prohibition Director for the State of New York, which State embraces that portion of the Port of New York wherein the complainant desires to bring its vessels equipped as aforesaid, and said defendant is by law charged with the duty

enforcing the terms and provisions of the Acts of Congress passed under authority of the Eighteenth Amendment to the Constitution of the United States and regulations of executive departments of the United States Government promulgated for the enforcement of such Acts of Congress.

The defendant John D. Appleby is a citizen and resident of the State of New York and is Zone Officer for this Zone, and said defendant is by law charged with the duty of enforcing the terms and provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury hereinbelow referred to, and has jurisdiction in the Port of New York, both in the States of New York and New Jersey.

III. This is a suit of a civil nature arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three thousand dollars (\$3,000) in value, exclusive of interest and costs.

IV. Complainant is a foreign corporation organized under the laws of the United Kingdom of Great Britain and Ireland for the purpose of carrying on a steamship business, and for very many years has been engaged in the business of transporting, as common carrier, passengers and cargo for hire on the high seas, and in transacting such business the complainant maintains and operates fleets of steamships in overseas trades between ports of the United States and ports in Brazil, the Argentine Republic and England.

All of the complainant's steamships are British vessels flying the British flag. The complainant owns fifty passenger and freight steamers of a total gross tonnage of about 450,000. Of these steamers four passenger vessels of a total gross tonnage of 44,521 tons, and the average six freight steamers, of a total gross tonnage of about 4,000 tons, trade regularly between South American ports and the Port of New York. There is also a cargo steamer which trades regularly between New York and Manchester, England, and others of complainant's said vessels are frequently calling at United States ports. Complainant's said steamers thus trading to the United States are worth many millions of dollars, and any interruption of their service causes great loss and damage to the complainant, the extent of which it is impossible to estimate. Regular passenger service is maintained between New York and ports in Brazil and the Argentine Republic, and regular freight service is maintained between New York and ports in Brazil and the Argentine Republic and also between New York and the port of Manchester, England. Complainant's principal office in the United States is located in the City of New York, and complainant occupies piers in the Port of New York in Brooklyn and at Hoboken. It also has offices in a number of other ports of the United States.

V. The crews operating complainant's vessels, including those carrying passengers and cargo and those carrying cargo alone, are made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic

liquors for beverage purposes is not prohibited and by whose customs the use of alcoholic liquors for beverage purposes is so widespread that complainant believes it would experience the greatest difficulty in obtaining adequate crews to operate their vessels running to the United States, if they were prohibited from furnishing a usual and reasonable amount of liquor to members of the crews.

VI. A considerable proportion of the passengers travelling to and from the United States by complainant's ships consist of through passengers from one foreign country to another by way of the United States. As those passengers are largely foreigners, accustomed to the use of wines and liquors with their meals, if complainant is prevented from furnishing wines and liquors to them while on the high seas, it believes they will travel by steamers of other lines not touching at United States ports.

VII. The prohibition of the use of alcoholic liquors on complainant's vessels as sea stores, for the reasonable use of crew and passengers, it is believed would cause your complainant great pecuniary loss by reason of the difficulty of obtaining crews, and would cause an annual loss of receipts from passenger business of many thousand dollars a year, and will involve irreparable damage to your complainant, in that it will destroy a considerable part of its business and render a considerable part of its equipment useless and cause a loss of its profits.

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VIII. It has at all times heretofore been the practice of complainant's vessels, in common with other British vessels, to carry as part of their sea stores certain wines, liquors and other intoxicating beverages for consumption by the vessel's passengers and crew, such sea stores, including such wines, liquors and other intoxicating beverages, being the property of the complainant and on board solely for such consumption on board and not for transportation or landing in the United States or elsewhere, and upon arrival of any vessel in the United States an accurate list of all such sea stores, including such wines, liquors and other intoxicating beverages, being furnished to the United States authorities. None of the intoxicating liquors so kept as sea stores for reasonable use of passengers and crew have been manufactured, sold or transported within, imported into or exported from the United States or any territory subject to the jurisdiction of the United States. All wines and other intoxicating liquors kept as sea stores on complainant's vessels as aforesaid have been legally acquired.

Since the adoption of the so-called National Prohibition Act of October 28, 1919, complainant's ships have been permitted freely to come and go in the port of New York and other ports and territorial waters of the United States with such sea stores, including such wines, liquors and other intoxicating beverages, on board, under regulations of the Secretary of the Treasury hereto annexed and marked Schedules A and B, and reference thereto is prayed, in reliance upon and under the authority of the above mentioned

7 Treasury decision and the regulations promulgated in connection therewith and the procedure always followed as above described, complainant in good faith purchased in foreign ports and now has on board its vessels on the high seas bound for the United States, as sea stores, quantities of intoxicating liquors of a value in excess of Three thousand dollars (\$3,000.). The complainant has at all times been ready and willing to conform to, and has conformed, to such regulations, and upon arrival of any of complainant's vessels within the jurisdiction of the United States such vessel has immediately been boarded by the United States customs officials, who thereupon placed such wines, liquors and other intoxicating beverages under seal and assumed exclusive control thereof until the same were unsealed by such customs officials upon the vessel's again leaving the jurisdiction of the United States.

IX. All of the alcoholic liquors carried as such sea stores on complainant's vessels are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for sea stores is taken on board complainant's vessels at foreign ports, and no part of such liquors is intended to be landed in the United States.

X. On or about October 5, 1922, as complainant is informed and believes, the Attorney General of the United States transmitted an opinion to the Secretary of the Treasury in which, among other things, he stated that the sale, transportation or possession of intoxicating liquors for beverage purposes on foreign vessels while in territorial waters of the United States is prohibited by said National Prohibition Act. Thereafter, the President of the United States directed that said National Prohibition Act be enforced in accordance with said opinion of the Attorney General, and directed the Secretary of the Treasury to proceed to the formulation of regulations for the enforcement of said law in accordance with said opinion of the Attorney General with respect to foreign ships.

Complainant is informed and believes that the defendant, the Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States and threaten to enforce said Prohibition Act as interpreted by the Attorney General. By order of the President of the United States, as complainant is informed and believes, the said regulations will not apply to foreign vessels sailing for the United States on or before October 14. The complainant's passenger steamer Van Dyk, however, sails from Trinidad for the United States on or about October 21, calling at Barbados, and the complainant's steamer Vestris is expected to sail from Buenos Aires toward the United States on or about October 21, and others of complainant's vessels will shortly from time to time thereafter be sailing from foreign ports for the United States, and, unless restrained, the defendants intend, as complainant is informed and believes, upon arrival of said vessels within the



United States, to seize all wines, liquors or other intoxicating beverages on board and included in the sea stores of said vessels, and threaten also to seize the vessels themselves as being in violation of said National Prohibition Act and subject to the penalties therein provided; and any such seizure of said wines, liquors or other intoxicating beverages constituting part of said sea stores of said vessels for use and consumption of passengers and crews as aforesaid, or seizure of said vessels themselves, will disrupt the sailings of complainant's vessels, prevent the performance of obligations incurred in respect thereof, deprive the complainant of a large

9 volume of patronage, and otherwise cause loss, damage and difficulties to the complainant, to its great and irreparable loss and injury, and will deprive complainant of its property without due process of law.

XI. Complainant is advised by counsel, and verily believes, that the aforesaid ruling by the Attorney General in respect to foreign ships carrying intoxicating beverage liquors as ships' stores for crew or passengers as aforesaid, and any regulations formulated by the Secretary of the Treasury for the enforcement of such ruling, are and will be unauthorized and void because neither the Eighteenth Amendment nor the National Prohibition Act prohibits the carriage of such liquors as such sea stores for crew and passengers as aforesaid, and an interference with the carriage of such sea stores would, therefore, violate complainant's rights under the law and under existing treaties between the United States and Great Britain; and also would deprive complainant of its property without due process of law.

XII. Complainant is advised by counsel and verily believes, that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders said Act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional and also would deprive complainant of its property without due process of law.

XIII. Complainant alleges that the defendant, Andrew W. Mellon, or his subordinates, are preparing regulations, and that pursuant to said opinion of the Attorney General or such regulations, the defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart, Ralph A. Day and John D. Appleby are threatening, notwithstanding the fact that the interpretation of the Act of Congress, known as the National Prohibition Act, by the Attorney General is erroneous, unauthorized and void and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said National Prohibition Act, if it purports to prohibit the carriage of said alcoholic beverages as sea stores for

crew and passengers, is unconstitutional and void for the reasons hereinabove stated, to seize said alcoholic liquors not constituting sea stores on complainant's vessels, and to enforce against the complainant, its officers, agents and servants, various pains and penalties, including fines and imprisonment, and various forfeitures of property provided by the Acts of Congress and regulations, and thus involve the complainant, its officers, agents and servants in numerous suits and by such threats to prevent complainant, its employes and servants, from carrying out its contracts, and thus deprive the complainant of its business and of its property without due process of law; all to the irreparable damage of complainant, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainant would be involved in numerous suits if it were forced to bring an action at law to relieve its employees and property from such penalty and forfeiture.

Forasmuch, therefore, as complainant is without remedy in the premises, except in a court of equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled, it respectfully prays that the above named defendants and each of them be directed to make a full, true and perfect answer to this bill of complaint, but not under oath, an answer under oath being expressly waived, and that said defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainant, its officers, servants and employees, or any of them, or complainant's steamships, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General, and from arresting and prosecuting the complainant, its officers, agents, servants or employees, or any of them, and from refusing to issue to the complainant and/or its steamer permits for clearance from the port of New York, or in any way interfering with the arrival or departure of the complainant's steamers, for or on account of any alleged violation by them, or any of them, of the Eighteenth Amendment, or the National Prohibition Act, on the ground or claim that the carriage or possession of said intoxicating liquors as aforesaid as sea stores for crew and passengers is contrary to law; or from molesting or otherwise interfering with the complainant in the peaceful possession of said intoxicating liquors on board such vessels as part of their sea stores.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause, whereby the defendants, their agents, servants, subordinates and employees, and each and every one of them be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainant further prays that a writ of subpoena be issued herein directed to said defendants, commanding them on a day set, to appear and answer the bill of complaint herein.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM  
NAVIGATION COMPANY, LTD.,  
By DAVID COOK,  
*Agent.*

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
*Solicitors for Complainant.*

27 William Street, Borough of Manhattan, New York City.

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## SCHEDULE A.

(Copy.)

(T. D. 38218.)

Sea Stores—Liquors.

Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 106 and 107 of the Customs Regulations of 1915 as amended.

Treasury Department, December 11, 1919.

To collectors of customs and others concerned:

All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes.

Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officer from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same line or owner.

Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(Signed)

JOUETT SHOUSE,  
*Assistant Secretary.*

(99623.)

14

## SCHEDULE B.

(Copy.)

(T. D. 38248.)

## Sea Stores—Liquors.

Opinion of the Attorney General with respect to the practice under T. D. 38218 of sealing liquors listed as sea stores on vessels while in ports of the United States. Distinction made between American and foreign vessels. T. D. 38218 amended.

Treasury Department, January 27, 1920.

To Collectors of Customs and Others Concerned:

Attention is invited to the appended copy of an opinion rendered the Department by the Attorney-General with respect to the practice under T. D. 38218 of sealing liquors carried as sea stores on all vessels while in the ports of the United States, as indicated by the questions submitted to him.

Following the opinion of the Attorney-General the first paragraph of T. D. 38218 is hereby amended to read as follows:

All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on foreign vessels should be sealed on arrival of the vessel in port, and such portions thereof released from time to time for use by the officers and crew.

The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification.

JOUETT SHOUSE,  
*Assistant Secretary.*

(198377.)

STATE OF NEW YORK,

*County of New York, ss:*

David Cook, being duly sworn, says: I am Managing Agent at New York for Liverpool, Brazil & River Plate Steam Navigation Company, Ltd. I have read the foregoing bill of complaint and know the contents thereof and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and the grounds of my belief as to all matters in said bill of complaint not stated to be on my knowledge are an examination of documents and other papers in my possession relating to the subject matter of this suit. The reason why this verification is not made by complainant is that it is a foreign corporation.

DAVID COOK.

2-667

Sworn to before me this 18th day of October, 1922.

[SEAL.]

EDWIN M. BRENGLE,  
Notary Public, Queens Co., No. 3072.

New York Co. Clerk's No. 856. Reg. No. 4613.  
Commission Expires March 30, 1924.

16 & 17 SIR:

Take notice that the original B/Complt. of which the within is a copy, was this day duly filed herein in the office of the clerk of this court

Dated, New York, 10-19-22.

Yours, etc.,

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
Proctors for —.

27 William Street, Borough of Manhattan, New York City.

To — — —, Proctor for —.

[Endorsed:] E-25-33. District Court of the United States, Southern District of New York. Liverpool, Brazil and River Plate Steam Navigation Company, Ltd., Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Copy. Bill of Complaint. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

18 U. S. District Court, Southern District of New York.

E. 25/33.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY  
LTD., Complainant,

versus

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer. Defendants.

*Notice of Appearance and Demand.*

You will please take notice that I am retained by, and appear as attorney for, the Defendants in this action, and demand service of copy of the complaint and all papers in this action upon me, at

office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours,

WILLIAM HAYWARD,  
*United States Attorney,  
Attorney for Defendant.*

New York, October 20, 1922.

To Messrs. Burlingham, Veeder, Masten & Feary, 27 William Street, Attorney- for Plaintiff.

19 & 20 [Endorsed:] U. S. District Court, Southern District of New York. Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., versus Andrew W. Mellon, et al. Notice of Appearance. William Hayward, United States Attorney, Attorney for Defendant. Due service of a copy of the within Notice is hereby admitted. Dated the 20 day of October, 1922. — — —, Plaintiff's Attorney. To Messrs. Burlingham, Veeder, Masten & Feary, 27 William Street, Plaintiff's Attorney.

21 In the District Court of the United States for the Southern District of New York.

E. 25-33.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY, LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Answer to Bill of Complaint.*

Now come the defendants herein and in answer to the bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the bill of complaint herein and every part thereof be dismissed, and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.

2. The Court has no jurisdiction to grant the relief prayed for or any part thereof.

3. The bill does not present a cause of action in equity under the Constitution of the United States.

4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

6. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

22 Second. In answer to the allegations set out in paragraph seventh of the complaint the defendants allege on information and belief that any difficulty which complainant might experience in obtaining adequate crews from among the nationals of countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread would be readily obviated by the payment of higher wages to said crews. Defendants are further informed and believe that many of the vessels of the American merchant marine carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages and that the said American vessels have never had the least difficulty in obtaining adequate crews from the nationals of such countries at the same wages paid to American crews.

Third. Defendants deny the allegations contained in paragraph eleventh of the bill of complaint that the ruling by the Attorney General referred to in said paragraph is and any regulations for the enforcement of such ruling are and will be unauthorized and void. Defendants further deny the allegation that such ruling and such regulations would violate complainant's rights under existing treaties between the United States, Great Britain and otherwise.

Fourth. Defendants deny the allegation contained in paragraph twelfth of the bill of complaint that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is correct, it renders said Act unconstitutional and void for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act

23 purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional.

The defendants allege on the other hand that it is well within the powers of Congress delegated to it by the Eighteenth Amendment to the Constitution of the United States to declare the possession of intoxicating liquor to be unlawful and that such legislative declaration contained in the National Prohibition Act is a valid exercise of the legislative power and has a reasonable relation to the enforcement of the constitutional mandate.



For a separate and distinct defense herein, defendants allege:

Fifth. Defendants re-allege and re-affirm as part of this separate and distinct defense each and every allegation contained in paragraphs First to Fourth above.

Sixth. Defendants are informed by their attorney and therefore allege that if the complainant is correct in its construction of the National Prohibition Act the implications involved are exceedingly serious and the claim of the complainant, if allowed, would carry with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States.

Seventh. Defendants are further informed and believe and therefore allege that for two years last past a large and profitable business has been carried on by divers persons with the object and result of importing liquor into this country contrary to law; that the vessels used by such persons are vessels under foreign registry and such vessels sail from foreign ports with clearance papers showing that they are bound for other foreign ports. The actual destination of such vessels is not the port shown in their clearance papers but some point on the high seas near the coast of the United States from which its liquors are transferred to smaller boats which complete the smuggling and importation of the liquor into the United States. Up to the present time the vigilance of the customs officials in seizing such vessels when they came within the territorial limits of the United States has somewhat mitigated the evils of this traffic but if, as complainant contends it is only necessary to put liquors under lock and key to make such transportation legal and foreign vessels can sail our territorial waters at will with cargoes of liquor, the enforcement of the prohibition against the importation of liquors, already difficult, will become practically impossible.

Eighth. The rulings of the Secretary of the Treasury referred to in the bill of complaint have already been used as a cloak to hide smuggling operations and if the doctrine underlying such rulings is declared to be the law as claimed by complainant, defendants verily believe that its use as a cloak for such operations will greatly increase. As an instance of the use of such regulations to hide smuggling defendants allege that on or about January 15, 1920, the British passenger steamship "Harbinger" sailed from Halifax, N.S., for Havana, Cuba, carrying with her a large quantity of intoxicating liquors as sea stores. The said vessel came into the port of Portland, Maine, alleging a shortage of coal, and there her liquor was sealed under customs seals. Her Master protested her innocence and claimed the right as a foreign vessel to transport intoxicating liquors as sea stores under seal within the territorial waters of the United States. This right was accorded her under the Treasury rulings until recently in force and on which complainant has relied until now. Being under suspicion, however, the "Harbinger" was conveyed by the coastguard cutter "Ossipee" to Cape Ann whence she entered the port of Boston and thence proceeded without convoy

to the neighborhood of New York where she was met by the coast-guard cutter "Gresham" which convoyed her to New York. On January 26th, she was convoyed down New York Bay by the coastguard cutter "Manhattan" to Dunham Shipyard, Staten Island. There she remained under customs surveillance until February 6th when the customs seals on the liquors were broken by the crew and an attempt was made to import them into the United States. When such attempt was made the crew of said vessel were arrested. Two have pleaded guilty to a violation of the Prohibition Act and the vessel has been libelled by the Government. After the crew were arrested it became evident that the journey of this vessel down the coast of the United States was not, as alleged and as appeared, because of insufficient coal-carrying space but for the purpose of finding purchasers of the liquor carried as sea stores.

Ninth. Defendants further allege that under the regulations of the Secretary of the Treasury referred to in the complaint herein, customs officers have made no physical inventory of the stores of liquors on any foreign ships either upon their arrival in the ports of the United States or upon their leaving such ports. Permission has been given to remove certain of the liquors under seal for the purposes of rations given to the crews, but no record is kept of the

amount of liquor which actually leaves United States ports on foreign vessels, nor is any inventory returned by such foreign vessels of the amount of liquors actually found when seals are broken by the ship's agents after leaving port.

Tenth. Defendants are informed and verily believe that the complainant makes large profits from the sale of intoxicating liquors on the high seas, such profits amounting to many thousand dollars per annum and further allege that loss of such profit is the only definitely ascertainable loss which the complainant will suffer if the National Prohibition Act as interpreted by the ruling of the Attorney General is given full force and effect.

Eleventh. Defendants further allege on information and belief that the sale of intoxicating liquors on the high seas by vessels carrying the American flag ceased with the issuance of the ruling of the Attorney General and is not now carried on. And defendants verily believe that if vessels of foreign registry are by the injunction of this Court facilitated in the sale of liquor on the high seas by being allowed to transport liquor within the territorial waters of the United States, the resultant damage to the American merchant marine will be great and irreparable. Not only will ships of the American merchant marine suffer the loss of revenue which they have hitherto enjoyed from the sale of intoxicating liquors on the high seas and which ships of foreign nations will continue to enjoy if the prayer of the complainant herein is granted, but defendants believe that a large number of passengers who would otherwise travel on American ships and who would travel on American ships if both American ships and foreign ships were placed in the same position in regard to the sale of liquor on the high seas, will, if foreign ships are placed

27 in an advantageous position in this regard travel on foreign ships and the American ships will lose a large amount of revenue thereby. Defendants are informed and verily believe that the loss of such revenue from the sales of liquor and from passage money in case of a differential treatment giving preference to foreign ships over American ships in the matter of transportation of intoxicating liquors within the territorial waters of the United States, will be sufficient to make it impossible for the American merchant marine to compete profitably with ships of foreign registry. The majority of the American passenger lines operating in the North Atlantic trade, in competition with complainant's and other foreign vessels are owned and operated directly by the United States Government. Any loss of revenue by reason of a differential treatment favorable to foreign ships will fall directly on the United States Government and its taxpayers.

Wherefore, defendants pray that the bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,  
*United States Attorney for the Southern  
District of New York, Attorney for  
Defendants.*

Office and P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

28 In the District Court of the United States for the Southern District of New York.

LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY,  
LTD., Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Stipulation.*

The above entitled suit having been duly brought on for trial by consent of the parties, at a Stated Term of the United States District Court for the Southern District of New York, before the Honorable Learned Hand, District Judge, and a motion for a judgment on the pleadings having been made by the complainant, and the Court having heretofore, at a Stated Term thereof, held at the United States Post Office Building in the City of New York on the 17th day of October, 1922, before the Honorable Learned Hand, heard extended

argument of counsel upon a similar motion in like suits by the Oceanic Steam Navigation Company, Ltd., and other complainants, involving similar questions;

It is stipulated that the said motion for judgment in the above entitled suit be, and the same hereby is, forthwith submitted without further argument for consideration and decision by the  
 29 Court, along with said suits of the Oceanic Steam Navigation Company, Ltd., and other complainants.

Dated, New York, October 19th, 1922.

BURLINGHAM, VEEDER, MASTEN &  
 FEAREY,

*Solicitors for Complainant.*

WILLIAM HAYWARD,

*United States Attorney for the Southern District of  
 New York, Solicitor for Defendants.*

30 & 31 [Endorsed:] E. 25-33. District Court of the United States, Southern District of New York. Liverpool, Brazil and River Plate Steam Navigation Company, Ltd., Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Copy. Stipulation. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

32 In the District Court of the United States for the Southern District of New York.

LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY,  
 LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
 Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer.  
 Defendants.

*Restraining Order.*

A motion having been made in the above entitled case for judgment on the pleadings, and by agreement between the parties submitted to the Court for determination, along with a similar motion made in the suit of The Oceanic Steam Navigation Company, Limited, against Andrew W. Mellon, and others, it is, on motion of Burlingham, Veeder, Masten & Fearey, Solicitors for the complainant,

Ordered that until the determination of said motion by entry of order thereon, the defendants, their successors, agents, servants and subordinates, and each of them, be, and hereby are, restrained from seizing, disturbing, removing or in any way interfering with wine

liquors or other intoxicating beverages on board complainant's ships as sea stores or medicines, as more particularly set forth in the said bill of complaint herein; from seizing, disturbing or in any way interfering with the complainant's ships by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages as ship's stores, as more particularly set forth in said bill of complaint, and from enforcing or attempting to enforce, or causing to be enforced against the complainant, its officers, agents or servants, or any of them, or any of its steamships, any of the pains, penalties, or forfeitures provided in and by the so-called National Prohibition Act enacted by Congress pursuant to the Eighteenth Amendment to the Federal Constitution; and from refusing to issue to complainant, or its steamers, permits for clearance from the Port of New York, or in any way interfering with the arrival or departure of any of the complainant's steamers, by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages, as said ship's stores, as more particularly set forth in the bill of complaint herein; and on like motion, it is further

Ordered that service of a copy of this order on the United States Attorney for the Southern District of New York shall be sufficient.

Dated, New York, October 21st, 1922.

LEARNED HAND,  
*United States District Judge.*

44 & 35 [Endorsed:] E. 25-33. District Court of the United States, Southern District of New York. Liverpool, Brazil and River Plate Steam Navigation Company, Complainant, vs. Andrew W. Mellon and others, Defendants. Copy. Restraining Order. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City. Oct. 21-22. William Hayward, U. S. Attorney, Att'y for Def'ts.

Sir: Take notice that the original of which the within is a copy, was this day duly filed herein in the office of the clerk of this Court.

Dated, New York, Oct. 21, 1922.

Yours, etc.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

27 William Street, Borough of Manhattan, New York City.

To Wm. Hayward, U. S. Att'y, Att'y for defendants.

36 United States District Court, Southern District of New York

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HENDERSON BROTHERS), LTD.,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States  
et al.,

And Ten Other Cases.

*Opinion.*

Oct. 23, 1922.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decrees upon the answers. The pleadings have been so drawn on both sides as to raise the merits of the controversy, and it is not necessary to set them forth in detail.

The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and liquors as part of their sea-stores. This was done with the consent of the public authorities who promulgated regulations recognizing the practice, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an option at that time given by the Attorney General, was that, as part of the ship's stores, these wines and liquors, if sealed and kept on

37 board, were not to be regarded as brought within the country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where the peace of the sovereign is at stake. Later the permission so given was further extended to allow the ships to dispense to their crews their customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of *Grogan v. Walker*, and *Anchor Line v. Aldridge*, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration, on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying in and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed to execute the law in accordance with this opinion, and this created the situation out of which these bills arise.

The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in Europe so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal, and carried out again, only for the entertainment of passengers embarking from the United States. Besides the wines and liquors so used the steamers carry a stock for the use of their crews. In the case of the

French, Italian and Belgian ships the law of their flag requires them to supply a ration of wine and in those cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore, the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign lines; they have freely sold their wines and liquors at sea and brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some cases the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the Port Officer, but the Collector of the Port of New York and the local Prohibition Director are defendants in all.

#### Appearances:

Hon. Van Vechten Veeder, for Oceanic Steam Navigation Co., Ltd., Liverpool, Brazil & River Plate Steam Navigation Co., Ltd., United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., The Netherlands American Steamship Co., (Holland America Line) and Pacific Steam Navigation Company.

Lucius H. Beers, Esq., for the Cunard Steamship Co., Ltd., and Anchor Line (Henderson Brothers).

Joseph P. Nolan, Esq., for Compagnie Generale Transatlantique.

Reid L. Carr, Esq., for United American Lines, et al.

Cleatus Keating, Esq. and John M. Woolsey, Esq., for International Mercantile Marine and International Navigation Co., Ltd.

William Hayward, Esq., United States Attorney and John Holley Mack, Esq., Assistant U. S. Attorney, for Defendants in all cases.

#### LEARNED HAND, D. J.:

It is conceded, and indeed could not be disputed, after *Grogan Walker and Anchor Line v. Aldridge*, decided May 15, 1922, that had the liquors here in question been a part of the ships' cargo, the bills would not lie. It makes no difference that they were not be broached while carried within territory of the United States; carriage would be transportation none the less. But because they are part of the ships' stores, in the sense that that term is gen-



erally understood, the plaintiffs argue that they do not fall within the same rule. This argument rests upon two alternative premises, first, that "transportation" involves a place where, and a person to whom, the goods are to be delivered, and second, that a ship's stores have by long custom been treated as a part of the "furniture," *Brough v. Whitmore*, 4 Term R. 206, or "appurtenances," *The Dundee*, 1 Hagg. Adm. 109, of the ship, which do not without particular mention become subject to the municipal law of the ports into which she enters, any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I do not see how that would help the plaintiffs. These liquors are carried for delivery at sea to the passengers and crew, and when so delivered their transportation ends. There appears to me no significant distinction in the fact that the place of delivery is the ship itself. The passengers, and for that matter, the crew, are not the same person as the owner, and if the passage of title or possession has anything to do with the matter, the title to, and possession of, the bottle or the dram, passes when it is handed to its consumer. The carriage within the limits of the Port of New York is a part of a transit whose purpose from the beginning is that very  
40 delivery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to search out and coal at sea friendly cruisers during war, as happened in 1914.

Therefore, I might admit the plaintiffs' interpretation of the word, if it were necessary. Nevertheless, it seems to me at best very doubtful whether it carries with it any such limitation. The cases in which the plaintiffs rely come only to this, that the jurisdiction of the United States under the interstate commerce clause does not terminate until delivery after a transit across State lines, *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196, *Rhodes v. Iowa*, 170 U. S. 412, *Louisville & Nashville R. R. v. Cook Brewing Co.*, 223 U. S. 70, *Danciger v. Cooley*, 248 U. S. 319. From this it does not follow that the term "transportation," as used in this statute, implies delivery to another than the person who carries the liquors. Suppose, for example, a parcel of liquor, made after the Amendment, and carried off to be laid away in a cache. There can be no question, I believe, that two separate crimes would be committed, "manufacture" and "transportation."

Nor does it seem to me that the thirteenth and fourteenth sections of Title II of the Prohibition Act, help the plaintiffs. Under these carriers are required to mark the consignor's and consignee's name on the outside of all packages. But it does not follow that a regulation like this of one kind of transportation imputes to the word itself any of the conditions which it enacts. In common use to transport means to carry about, and I see no reason why it should mean less in Section three. The law clearly intended by immobilizing liquor to make surreptitious traffic in it impossible and its police  
41 would as well cover movements which might be incidental to as those which immediately terminated in, a delivery to some one else. The case of *Street v. Lincoln Safe Deposit Company*, 35

U. S. 88, did not decide anything to the contrary; it turned upon the fact that the possession of the liquor in the leased room and in the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as Street had, for the possession of the liquor. I conclude therefore that the carriage in question is "transportation."

The first point being thus disposed of, I come to the second. It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States, (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they must be manifested and may not be excessive in quantity, as such they are not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbade generally the transportation of liquors, it must be read in the light of this statute and the long usage under it, and that what is not within the United States for the purposes of customs ought not to be so for purposes of prohibition. In addition they urge that under the maritime law it is held that for most purposes sea-stores will be treated as a part of the ship herself. If she is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and least of all a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to these, *Brown v. Duchesne*, 19 How. 123, *Taylor v. U. S.*, 207 U. S. 120, *Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122. Nevertheless, everyone must agree that the question is no more than one of interpretation, for in the cases at bar Congress certainly might, if it chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

*Grogan v. Walker*, supra, and *Anchor Line v. Aldridge*, supra, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thorough-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the Amendment, and its very want of particularity is a good index

that it meant to cover what it could. For this reason it is to be distinguished from earlier local acts of the same kind, as for example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful, since in form it only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the policy, and not the promise, of the nation. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

44 However, the motives for positively assuming that such stores must be considered as included within Section three appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legislative motives is speculative, but that vice, if it be one, is of the plaintiffs' making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitations on that meaning, because of the supposed intent of Congress. Since, therefore, I am asked to have a recourse to implications, I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises.

In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan v. Walker*, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsi-

sible owners may not be as scrupulous, and the law runs for all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of the stocks  
 45 are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question; it must be enough for him that each is forbidden.

46 It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the section covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and

crews' rations stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later.

Cases like *Brown v. Duchesne*, supra, *Taylor v. U. S.*, supra, and *Scharrenberg v. U. S.*, supra, are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves from the municipal law. But they were all judicial exceptions by

47 implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning of Section three accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is *sui generis*, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages. It is true that the prayers for relief do include so much, but prayers without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs than anything I may think about the law. The power under

48 the Seventy-fourth Rule to grant such an order is undoubted notwithstanding a dismissal of the bill, *Merriam River Savings Bank v. City of Clay Center*, 219 U. S. 527, *Staffords v. King*, 90 Fed. R. 136 (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he holds his decree. Like all such matters, it depends upon a balance between the two, and must assume that the chances of success are not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some nicety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far as the loss of the liquors themselves is concerned the damage cannot be said to be irreparable. These must be condemned before they can be forfeited, and in the present state of the calendars the

cases at bar will be finally determined long before such libels can be tried. If I am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the long acquiescence of the authorities in the practices here in question will moderate the ultimate penalty of confiscation; I must assume that the plaintiffs will receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as part of the crews' ration. If the ration is cut off, some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages to stay the enforcement of the law against stocks of wine and liquor necessary for crews' rations, if honestly kept and dispensed for that purpose alone.

As to the maintenance of Passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing inter se and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is easy to say, if one does not take seriously the opinion behind the Amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury which no judge has the right to ignore. The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is.

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge the plaintiffs have no case. Therefore I will go no further than to issue an injunction against interfering with the carriage of a stock necessary for the crews' rations



on the east-bound voyage. The plaintiffs must each give a bond in the sum of twenty-five thousand dollars, conditional against the use of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal if the same be taken at once. Settle orders on notice.

LEARNED HAND,

D. J.

October 23, 1922.

51 At a Stated Term of the District Court of the United States for the Southern District of New York Held in the Court Rooms Thereof, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 25th Day of October, 1922.

Present: Hon. Learned Hand, District Judge.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY, LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer. Defendants.

*Final Decree.*

October 25, 1922.

This cause came on to be heard at this term upon motions by the defendants to dismiss the bill of complaint and by the complainant for a final decree in its favor on the pleadings, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the bill of complaint herein be dismissed and defendants have judgment against the complainant for their costs to be taxed, and it is further

Ordered, adjudged and decreed that until final hearing of this cause in the Supreme Court of the United States and the entry of an order or decree on the mandate of that Court, the defendants

52 their servants, agents and subordinates, be and they hereby are stayed and restrained from seizing or interfering with the possession or carriage by complainant herein of a stock of liquors customary for the rations of the crews of complainant's vessels upon each eastbound voyage, upon the filing of a bond in the sum of twenty-five thousand dollars (\$25,000), conditioned against the gift, issuance or sale of such stock of liquors by complainant otherwise than as crews' rations to the crews of complainant's vessels and it is further

Ordered, adjudged and decreed that if complainant shall fail to take an appeal herein to the Supreme Court of the United States



within five days from the entry hereof, or to move for preference on the first motion day of the Supreme Court, the defendants may move herein to vacate the injunction granted above.

LEARNED HAND,  
U. S. D. J.

53 & 54 [Endorsed:] E. 25-33. District Court of the United States, Southern District of New York. Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of the Customs for the Port of New York, Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants. Copy. Final Decree. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

55 In the District Court of the United States for the Southern District of New York.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY,  
LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

### *Assignment of Errors.*

The complainant hereby assigns error in the final judgment or decree of the District Court herein entered October 25th, 1922, in the following respects:

First. The Court erred in dismissing the bill of complaint herein.

Second. The Court erred in denying the petition for an injunction.

Third. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States prohibits a foreign ship from keeping on board while on the territorial waters of the United States intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fourth. The Court erred in holding that the National Prohibition Act prohibits a foreign ship from keeping on board, while on the territorial waters of the United States, intoxicating beverages constituting part of the customary sea stores of such ship lawfully

56 acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the crew as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Sixth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the passengers as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Seventh. That the National Prohibition Act as construed and applied by the District Court is unconstitutional and void because enforcement thereof with respect to sea stores on the complainant's vessels would deprive the complainant of its property and subject it to penalties without due process of law.

Eighth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the third and fourth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Ninth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the fifth and sixth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Tenth. The Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverages in the circumstances mentioned in the third, fourth, fifth and sixth assignments of error is prohibited by the Eighteenth Amendment and the National Prohibition Act.

Eleventh. The Court erred in refusing to hold that the interpretation of the National Prohibition Act mentioned in the ninth assignment of error was unconstitutional and invalid and not within the powers conferred by Congress by the Constitution.

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Wherefore complainant-appellant prays that said decree or judgment of the United States District Court for the Southern District of New York be reversed and an injunction granted the complainant as prayed for in the bill of complaint herein, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

58 & 59 [Endorsed:] E. 25-33. District Court of the United States, Southern District of New York. Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants. Assignment of Errors. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

60 In the District Court of the United States for the Southern District of New York.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY,  
LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Petition for Appeal and Allowance.*

The complainant above named, Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., conceiving itself aggrieved by the final judgment and decree entered herein October 25, 1922, does hereby appeal from said final judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, from which it appears that this case is appealable directly from this court to the said Supreme Court under Section 238 of the Judicial Code, and said Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., prays that it be allowed this appeal and that a transcript of the record papers and proceedings upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

The foregoing appeal is hereby allowed as prayed for.

LEARNED HAND,  
U. S. D. J.

To Hon. William Hayward, United States Attorney; Alexander Gilchrist, Jr., Esq., Clerk, United States District Court, Southern District of New York.

61 & 62 [Endorsed:] E. 25-33. District Court of the United States, Southern District of New York. Liverpool, Brazil & River Plate Steam Navigation Co., Ltd., Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Copy. Petition for Appeal. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

63

*Citation on Appeal.*

By the Honorable Learned Hand, One of the United States District Judges for the Southern District of New York, in the Second Circuit.

To Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at Washington, in the District of Columbia on the 20th day of November, 1922, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., is complainant and you are defendants to show cause, if any there be, why the decree in said cause mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 25th day of October, in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

LEARNED HAND,  
*United States Judge for the Southern District  
of New York, in the Second Circuit.*

64

[Endorsed:] E. 25-33. United States District Court, Southern District of New York. Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., Complainant, against Andrew W.

Mellon, Secretary of the Treasury of the United States, et al., Defendants. Citation. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, City of New York.

65 In the District Court of the United States for the Southern District of New York.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY, LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Stipulation.*

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of said District Court in the above entitled matter as agreed on by the parties.

Dated New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

WM. HAYWARD,

*U. S. Atty., Attorney for Defendants.*

66 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY, LTD., Complainant,

vs.

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 25th day of October in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of the District Court of the United States, Southern District of N. Y.]

ALEX GILCHRIST, JR.,  
*Clerk.*

Endorsed on cover: File No. 29,217. S. New York D. C. U. S. Term No. 667. Liverpool, Brazil and River Plate Steam Navigation Company, Limited, Appellant, vs. Andrew W. Mellon, Secretary of the Treasury of the United States, et al. Filed October 27th, 1922. File No. 29,217.

(7603)

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

**No. 688.**

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THE ROYAL MAIL STEAM PACKET COMPANY, APPELLANT,

*vs.*

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, ET AL.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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FILED OCTOBER 27, 1922.

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(29,218)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 668.

THE ROYAL MAIL STEAM PACKET COMPANY, APPELLANT,

vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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*Equity Subpœna.*

The President of the United States of America to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by The Royal Mail Steam Packet Company, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you, of two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 18th day of October, in the year One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

ALEX GILCHRIST, JR.,  
*Clerk.*

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
*Complainant's Sol'rs.*

The Defendants are required to file their answer or other defense to the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX GILCHRIST, JR.,  
*Clerk.*

2 In the District Court of the United States for the Southern District of New York.

In Equity.

THE ROYAL MAIL STEAM PACKET COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, Defendants.

*Bill of Complaint.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainant, The Royal Mail Steam Packet Company, brings this its bill of complaint against the above-named defendants, and respectfully shows as follows:

I. Complainant, The Royal Mail Steam Packet Company, is a corporation duly organized and existing under the laws of Great Britain and Ireland, with its principal place of business at London, England.

II. Complainant is informed and verily believes and therefore alleges on information and belief:

The defendant Andrew W. Mellon is Secretary of the Treasury of the United States and he is, and his subordinates are, by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of the United States and the making of Regulations promulgated for the purpose of enforcing such Acts of Congress.

3 The defendant Henry C. Stuart is a subordinate of the Secretary of the Treasury, and is Acting Collector of Customs for the Port of New York, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury which from time to time may be promulgated, within that portion of the Port of New York wherein the complainant desires to bring its vessels equipped with certain sea stores as herein set forth.

The defendant Ralph A. Day is a subordinate of the said Secretary of the Treasury and is the Prohibition Director for the State of New York, which State embraces that portion of the Port of New York wherein the complainant desires to bring its vessels equipped as aforesaid, and said defendant is by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under authority of the Eighteenth Amendment to

Constitution of the United States and regulations of executive departments of the United States Government promulgated for the enforcement of such Acts of Congress.

III. This is a suit of a civil nature arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three thousand Dollars (\$3,000) in value, exclusive of interest and costs.

IV. Complainant is a foreign corporation organized under the laws of Great Britain and Ireland for the purpose of carrying on steamship business, and for very many years has been engaged in the business of transporting as common carrier passengers and cargo for hire on the high sea, and in transacting such business complainant maintains and operates fleets of steamships in overseas trades between ports of the United States and ports in England, France and Holland.

All the complainant's vessels are British vessels flying the British flag. Complainant owns thirty (30) passenger vessels of a total gross tonnage of 275,000, and twenty-five (25) freight steamers of a total gross tonnage of 175,000. Of these vessels, six (6) passenger steamers of a total gross tonnage of about 75,000 trade regularly between foreign ports and ports of the United States. The complainant's eight steamers call from time to time at ports in the United States making voyages to and from those ports to and from the ports of foreign countries. Said steamers are worth many millions of dollars, and any interruption of their regular services causes great loss and damage to the complainant, the extent of which it is impossible to estimate. Regular passenger services are maintained between New York and Southampton, England, Cherbourg, France and Hamburg, Germany; also between San Francisco and Seattle and Rotterdam, Holland, via the Panama Canal. Complainant also operates during the winter season beginning December 1 a regular weekly passenger and freight service between New York and Bermuda and conducts during the winter three cruises to various foreign ports in the West Indies. Complainant's principal office in the United States is located in the City of New York, and it occupies piers in the port and harbor of New York. It also has offices and pier accommodations in a number of other ports in the United States.

The crews operating complainant's vessels, including those carrying passengers and cargo and those carrying cargo alone, are made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic liquors for beverage purposes is not prohibited, by whose customs the use of alcoholic liquors for beverage purposes is so wide-spread that complainant believes it would experience the greatest difficulty in obtaining adequate crews to operate its vessels running to the United States if it is prohibited from furnishing a usual and reasonable amount of liquor to members of the crews.

VI. By local regulations in force as to British vessels, they are required to have on board a certain amount of liquor for medicinal and emergency use.

Among passenger vessels regularly crossing the North Atlantic from European ports are many which land at Canadian ports, and if your complainant is prohibited from furnishing its passengers with alcoholic beverages, it believes a large number of passengers, who would otherwise have patronized complainant's ships, will patronize lines landing at Canadian ports.

A considerable portion of passengers traveling to and from the United States by complainant's ships consists of through passengers from one foreign country to another by way of the United States. As these passengers are largely foreigners, accustomed to the use of wines and liquors with their meals, if complainant is prevented from furnishing wines and liquors to them while on the high seas, it believes they will travel by steamers of other lines not touching at United States ports.

VII. The prohibition of the use of alcoholic liquors on complainant's vessels as sea stores, for the reasonable use of crew and passengers, it is believed would cause your complainant great pecuniary loss by reason of the difficulty of obtaining crews, and would cause an annual loss of receipts from passenger business of many thousand

dollars a year, and will involve irreparable damage to your complainant, in that it will destroy a considerable part of its business and render a considerable part of its equipment useless and cause a loss of its profits.

VIII. It has at all times heretofore been the practice of complainant's vessels, in common with other British vessels, to carry as part of their sea stores, certain wines, liquors and other intoxicating beverages for consumption by the vessel's passengers and crew. Such sea stores, including such wines, liquors and other intoxicating beverages being the property of the complainant and on board solely for such consumption on board and not for transportation or landing in the United States or elsewhere, and upon arrival of such vessel in the United States an accurate list of all such sea stores, including such wines, liquors and other intoxicating beverages, being furnished to the United States authorities. None of the intoxicating liquors so kept as sea stores for reasonable use of passengers and crew have been manufactured, sold or transported within, imported into or exported from the United States or any territory subject to the jurisdiction of the United States. All wines and other intoxicating liquors kept as sea stores on complainant's vessels as aforesaid have been legally acquired.

Since the adoption of the so-called National Prohibition Act, October 28, 1919, complainant's ships have been permitted free to come and go in the port of New York and other ports and territorial waters of the United States with such sea stores, including such wines, liquors and other intoxicating beverages, on board, under no



lations of the Secretary of the Treasury hereto annexed and marked Schedules A and B and reference thereto is prayed.

In reliance upon and under the authority of the above mentioned Treasury Decision and the Regulations promulgated in connection therewith and the procedure always followed as above described, complainants in good faith purchased in foreign ports and now have on board their vessels on the highseas bound for the United States, as sea stores, quantities of intoxicating liquor of a value in excess of Three Thousand Dollars (\$3,000). The complainant has at all times been ready and willing to conform to, and has conformed, to such regulations, and upon arrival of any of complainant's vessels within the jurisdiction of the United States such vessel has immediately been boarded by the United States customs officials, who thereupon placed such wines, liquors and other intoxicating beverages under seal and assumed exclusive control thereof until the same were unsealed by such customs officials upon the vessel's again leaving the jurisdiction of the United States.

IX. All of the alcoholic liquors carried as such sea stores on complainant's vessels, are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for sea stores is taken on board complainant's vessels at foreign ports, and no part of such liquors is intended to be landed in the United States.

X. On or about October 5, 1922, as complainant is informed and believes, the Attorney General of the United States transmitted an opinion to the Secretary of the Treasury, in which, among other things, he stated that the sale, transportation or possession of intoxicating liquors for beverage purposes on foreign vessels while in territorial waters of the United States is prohibited by said National Prohibition Act. Thereafter the President of the United States directed that said National Prohibition Act be enforced in accordance with said opinion of the Attorney General, and directed the Secretary of the Treasury to proceed to the formulation of regulations for the enforcement of said law in accordance with said opinion of the Attorney General with respect to foreign ships. Complainant is informed and believes that the defendant, the Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States and threaten to enforce said Prohibition Act as interpreted by the Attorney General. By order of the President the United States, as complainant is informed and believes, the said regulations will not apply to foreign vessels sailing for the United States on or before October 14. The complainant's passenger steamer Oropesa, however, sails from Cherbourg, France, and Southampton, England, for the United States on October 20, and others of complainant's vessels will shortly from time to time thereafter be sailing from foreign ports for the United States, and, unless re-

strained, the defendants intend, as complainant is informed and believes, upon arrival of said vessels within the United States, to seize all wines, liquors or other intoxicating beverages on board and included in the sea stores of said vessels, and threaten also to seize the vessels themselves as being in violation of said National Prohibition Act and subject to the penalties therein provided; and any such seizure of said wines, liquors or other intoxicating beverages constituting part of said sea stores of said vessels for use and consumption of passengers and crews as aforesaid, or seizure of said vessels themselves, will disrupt the sailings of complainant's vessels, prevent the performance of obligations incurred in respect thereof, deprive the complainant of a large volume of patronage, and otherwise cause loss, damage and difficulties to the complainant, to its great and irreparable loss and injury; and will deprive complainant of its property without due process of law.

XI. Complainant is advised by counsel, and verily believes, that the aforesaid ruling by the Attorney General in respect to  
9 foreign ships carrying intoxicating beverage liquors as ship's stores for crew or passengers as aforesaid, and any regulations formulated by the Secretary of the Treasury for the enforcement of such ruling, are and will be unauthorized and void because neither the Eighteenth Amendment nor the National Prohibition Act prohibits the carriage of such liquors as such sea stores for crew and passengers as aforesaid; and an interference with the carriage of such sea stores would, therefore, violate complainant's rights under the law and under existing treaties between the United States and Great Britain and otherwise and also would deprive complainants — their property without due process of law.

XII. Complainant is advised by counsel, and verily believes, that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders said Act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional.

XIII. Complainant alleges that the defendant, Andrew W. Mellon, or his subordinates, are preparing regulations, and that pursuant to said opinion of the Attorney General or such regulations, the defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart and Ralph A. Day, are threatening, notwithstanding the fact that the interpretation of the Act of Congress, known as the National Prohibition Act, by the Attorney General is erroneous, unauthorized and void and that  
10 it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding

the fact that said National Prohibition Act, if it purports to prohibit the carriage of said alcoholic beverages as sea stores for crew and passengers, is unconstitutional and void for the reasons hereinabove stated, to seize said alcoholic liquors now constituting sea stores on complainant's vessels, and to enforce against the complainant, its officers, agents and servants, various pains and penalties, including fines and imprisonment, and various forfeitures of property provided by the Acts of Congress and regulations, and thus involve the complainant, its officers, agents and servants, in numerous suits and by such threats to prevent complainant, its employees and servants, from carrying out its contracts, and thus deprive the complainant of its business and of its property without due process of law; all to the irreparable damage of complainant, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainant would be involved in numerous suits if it were forced to bring an action at law to relieve its employees and property from such penalty and forfeiture.

Forasmuch, therefore, as complainant is without remedy in the premises, except in a court of equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled, it respectfully prays that the above-named defendants and each of them be directed to make a full, true and perfect answer to this Bill of Complaint, but not under oath, an answer under oath being expressly waived, and that said defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainant, its officers, servants and employees, or any of them, or complainant's steamships, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General, and from arresting and prosecuting the complainant, its officers, agents, servants or employees, or any of them, and from refusing to issue to the complainant and/or its steamers permits for clearance from the port of New York, or in any way interfering with the arrival or departure of the complainant's steamers, for or on account of any alleged violation by them, or any of them, or on account of any alleged violation by them, or any of them, of the Eighteenth Amendment or the National Prohibition Act, on the ground or claim that the carriage or possession of said intoxicating liquors as aforesaid as sea stores for crew and passengers is contrary to law; or from molesting or otherwise interfering with the complainant in the peaceful possession of said intoxicating liquors on board such vessels as part of their sea stores.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause whereby the defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainant further prays that a writ of subpoena be issued herein directed to said defendants, commanding them on a day set to appear and answer the Bill of Complaint herein.

THE ROYAL MAIL STEAM PACKET  
By SANDERSON & SONS, INC.,  
E. H. HUNTER,  
*Agent, Treas.*

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
*Solicitors for Complainant.*

27 William Street, Borough of Manhattan, New York City.

13 STATE OF NEW YORK,  
*County of New York, ss:*

E. Harvey Hunter, being duly sworn, says:

I am Treasurer of Sanderson & Sons, Inc., managing agent in New York for the complainant herein. I have read the foregoing bill of complaint and know the contents thereof and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and the grounds of my belief as to all matters in said bill of complaint not stated to be on my knowledge are an examination of documents and other papers in my possession relating to the subject matter of this suit. The reason why this verification is not made by the complainant is that it is a foreign corporation.

E. HARVEY HUNTER.

Sworn to before me this 16 day of October, 1922.

[SEAL.]

FREDERICK W. MUELLER,  
*Notary Public, Queens County, No. 1175.*

Certificate filed in New York County No. 362.

Term expires March 30, 1924.

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## SCHEDULE A.

(Copy.)

(T. D. 38218.)

## Sea Stores—Liquors.

Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 106 and 107 of the Customs Regulations of 1915 as amended.

Treasury Department, December 11, 1919.

To Collectors of Customs and Others Concerned:

All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same Line or owner.

Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(Signed)

JOUETT SHOUSE,

*Assistant Secretary.*

(99623.)

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## SCHEDULE B.

(Copy.)

(T. D. 38248.)

## Sea Stores.—Liquors.

Opinion of the Attorney General with respect to the practice under T. D. 38218 of sealing liquors listed as sea stores on vessels while in ports of the United States. Distinction made between American and foreign vessels. T. D. 38218 amended.

Treasury Department, January 27, 1920.

To Collectors of Customs and Others Concerned:

Attention is invited to the appended copy of an opinion rendered the Department by the Attorney-General with respect to the practice under T. D. 38218 of sealing liquors carried as sea stores on all vessels while in the ports of the United States, as indicated by the questions submitted to him.

Following the opinion of the Attorney-General the first paragraph of T. D. 38218 is hereby amended to read as follows:

All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on foreign vessels should be sealed on arrival of the vessel in port, and such portions thereof released from time to time for use by the officers and crew.

The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification.

JOUETT SHOUSE,  
Assistant Secretary.

(108377.)

16 & 17 [Endorsed:] E. 25-28. District Court of the United States, Southern District of New York. The Royal Mail Steam Packet Company, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Copy. Bill of Complaint. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

18 U. S. District Court, Southern District of New York.

E. 25/28.

ROYAL MAIL STEAMPACKET COMPANY, Complainant,

versus

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Notice of Appearance and Demand.*

You will please take notice that I am retained by, and appear as attorney for, the Defendants in this action, and demand service of copy of the complaint and all papers in this action upon me, at my

office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours,

WILLIAM HAYWARD,  
*United States Attorney,  
Attorney for Defendants.*

New York, October 20, 1922.

To Burlingham, Veeder, Masten & Fearey, Esqs., 27 William Street, Attorney- for Plaintiff.

19 & 20 [Endorsed:] E. 25-28. U. S. District Court, Southern District of New York. The Royal Mail Steampacket Company versus Andrew W. Mellon, et al. Notice of Appearance. William Hayward, United States Attorney, Attorney for Defendant. Due service of a copy of the within Notice is hereby admitted. Dated the 20 day of Oct., 1922. — — —, Plaintiff's Attorney. To Messrs. Burlingham, Veeder, Masten & Fearey, 27 William Street, Plaintiff's Attorney.

21 In the District Court of the United States for the Southern District of New York.

E. 25-28.

THE ROYAL MAIL STEAM PACKET COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Answer to Bill of Complaint.*

Now come the defendants herein and in answer to the bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the amended bill of complaint herein and divers parts thereof be dismissed, and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.
2. The Court has no jurisdiction to grant the relief prayed for or any part thereof.
3. The bill does not present a cause of action in equity under the Constitution of the United States.



4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

22 6. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

Second. In answer to the allegations set out in paragraph seventh of the complaint the defendants allege on information and belief that any difficulty which complainant might experience in obtaining adequate crews from among the nationals of countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread would be readily obviated by the payment of higher wages to said crews. Defendants are further informed and believe that many of the vessels of the American Merchant Marine carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages and that the said American vessels have never had the least difficulty in obtaining adequate crews from the nationals of such countries at the same wages paid to American crews.

Third. Defendants deny the allegations contained in paragraph eleventh of the bill of complaint that the ruling by the Attorney General referred to in said paragraph is and any regulations for the enforcement of such ruling are and will be unauthorized and void. Defendants further deny the allegation that such ruling and such regulations would violate complainant's rights under existing treaties between the United States, Great Britain and otherwise.

Fourth. Defendants deny the allegation contained in paragraph Twelfth of the bill of complaint that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is correct, it renders said Act unconstitutional and void for the reason that the National Prohibition Act was adopted by the

23 Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional. The defendants allege on the other hand that it is well within the powers of Congress delegated to it by the Eighteenth Amendment to the Constitution of the United States to declare the possession of intoxicating liquor to be unlawful and that such legislative declaration contained in the National Prohibition Act is a valid exercise of the legislative power and has a reasonable relation to the enforcement of the constitutional mandate.

For a separate and distinct defense herein, defendants allege:

Fifth. Defendants re-allege and re-affirm as part of this separate and distinct defense each and every allegation contained in paragraphs First to Fourth above.

Sixth. Defendants are informed by their attorney and therefore allege that if the complainant is correct in its construction of the National Prohibition Act the implications involved are exceedingly serious and the claim of the complainant, if allowed, would carry with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States.

Seventh. Defendants are further informed and believe and therefore allege that for two years last past a large and profitable business has been carried on by divers persons with the object and result of importing liquor into this country contrary to law; that the vessels used by such persons are vessels under foreign registry and  
24 such vessels sail from foreign ports with clearance papers showing that they are bound for other foreign ports. The actual destination of such vessels is not the port shown in their clearance papers but some point on the high seas near the coast of the United States from which its liquors are transferred to smaller boats which complete the smuggling and importation of the liquor into the United States. Up to the present time the vigilance of the customs officials in seizing such vessels when they came within the territorial limits of the United States has somewhat mitigated the evils of this traffic but if, as complainant contends it is only necessary to put liquors under lock and key to make such transportation legal and foreign vessels can sail our territorial waters at will with cargoes of liquor, the enforcement of the prohibition against the importation of liquors, already difficult, will become practically impossible.

Eighth. The rulings of the Secretary of the Treasury referred to in the bill of complaint have already been used as a cloak to hide smuggling operations and if the doctrine underlying such rulings is declared to be the law as claimed by complainant, defendants verily believe that its use as a cloak for such operations will greatly increase. As an instance of the use of such regulations to hide smuggling defendants allege that on or about January 15, 1920, the British passenger steamship "Harbinger" sailed from Halifax, N. S., for Havana, Cuba, carrying with her a large quantity of intoxicating liquors listed as sea stores. The said vessel came into the port of Portland, Maine, alleging a shortage of coal, and there her liquor was  
25 sealed under customs seals. Her master protested her innocence and claimed the right as a foreign vessel to transport intoxicating liquors as sea stores under seal within the territorial waters of the United States. This right was accorded her under the Treasury rulings until recently in force and on which complainant has relied until now. Being under suspicion, however, the "Harbinger" was convoyed by the coastguard cutter "Ossipec" to Cape Ann whence she entered the port of Boston and thence proceeded without convoy to the neighborhood of New York where she was met by the coastguard cutter "Gresham" which convoyed her to New York. On January 26th. she was convoyed down New York Bay by the coastguard cutter "Manhattan" to Dunham Shipyard, Staten Island. There she remained under customs surveillance until Feb-

ruary 6th when the customs seals on the liquors were broken by the crew and an attempt was made to import them into the United States. When such attempt was made the crew of said vessel were arrested. Two have pleaded guilty to a violation of the Prohibition Act and the vessel has been libelled by the Government. After the crew were arrested it became evident that the journey of this vessel down the coast of the United States was not, as alleged and as appeared, because of insufficient coal-carrying space but for the purpose of finding purchasers of the liquor carried as sea stores.

Ninth. Defendants further allege that under the regulations of the Secretary of the Treasury referred to in the complaint herein, customs officers have made no physical inventory of the stores of liquors on any foreign ships either upon their arrival in the ports of the United States or upon their leaving such ports. Permission has been

26 given to remove certain of the liquors under seal for the purposes of rations given to the crews, but no record is kept of the amount of liquor which actually leaves United States ports on foreign vessels, nor is any inventory returned by such foreign vessels of the amount of liquors actually found when seals are broken by the ship's agents after leaving port.

Tenth. Defendants are informed and verily believe that the complainant makes large profits from the sale of intoxicating liquors on the high seas, such profits amounting to many thousand dollars per annum and further allege that loss of such profit is the only definitely ascertainable loss which the complainant will suffer if the National Prohibition Act as interpreted by the ruling of the Attorney General is given full force and effect.

Eleventh. Defendants further allege on information and belief that the sale of intoxicating liquors on the high seas by vessels carrying the American flag ceased with the issuance of the ruling of the Attorney General and is not now carried on. And defendants verily believe that if vessels of foreign registry are by the injunction of this Court facilitated in the sale of liquor on the high seas by being allowed to transport liquor within the territorial waters of the United States, the resultant damage to the American merchant marine will be great and irreparable. Not only will ships of the American merchant marine suffer the loss of revenue which they have hitherto enjoyed from the sale of intoxicating liquors on the high seas and which ships of foreign nations will continue to enjoy if the prayer of the complainant herein is granted, but defendants believe that a

27 large number of passengers who would otherwise travel on American ships and who would travel on American ships if both American ships and foreign ships were placed in the same position in regard to the sale of liquor on the high seas, will, if foreign ships are placed in an advantageous position in this regard, travel on foreign ships and the American ships will lose a large amount of revenue thereby. Defendants are informed and verily believe that the loss of such revenue from the sales of liquor and from passage money in case of a differential treatment giving preference

to foreign ships over American ships in the matter of transportation of intoxicating liquors within the territorial waters of the United States, will be sufficient to make it impossible for the American merchant marine to compete profitably with ships of foreign registry. The majority of the American passengers liners operating in the North Atlantic trade, in competition with complainant's and other foreign vessels are owned and operated directly by the United States Government. Any loss of revenue by reason of a differential treatment favorable to foreign ships will fall directly on the United States Government and its tax-payers.

Wherefore, defendant prays that the amended bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,

*United States Attorney for the Southern District  
of New York, Attorney for Defendants.*

Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

[Endorsed:] E. 25-28.

28 United States District Court, Southern District of New York.

THE ROYAL MAIL STEAM PACKET COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Stipulation.*

The above entitled suit having been duly brought on for trial by consent of the parties, at a Stated Term of the United States District Court for the Southern District of New York, before the Honorable Learned Hand, District Judge, and a motion for a judgment on the pleadings having been made by the complainant, and the Court having heretofore, at a Stated Term thereof, held at the United States Post Office Building in the City of New York on the 17th day of October, 1922, before the Honorable Learned Hand, heard extended argument of counsel upon a similar motion in like suits by the Oceanic Steam Navigation Company, Ltd., and other complainants, involving similar questions;

It is stipulated that the said motion for judgment in the above entitled suit be, and the same hereby is, forthwith submitted without

- 29 further argument for consideration and decision by the Court, along with said suits of the Oceanic Steam Navigation Company, Ltd., and other complainants.

Dated, New York, October 19th, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

WILLIAM HAYWARD,

*United States Attorney for the Southern District  
of New York, Solicitor for Defendants.*

- 30 & 31 [Endorsed:] E. 25-28. District Court of the United States, Southern District of New York. The Royal Mail Steam Packet Company, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Copy. Stipulation. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

- 32 In the District Court of the United States for the Southern District of New York.

THE ROYAL MAIL STEAM PACKET COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Restraining Order.*

A motion having been made in the above entitled case for judgment on the pleadings, and by agreement between the parties submitted to the Court for determination, along with a similar motion made in the suit of The Oceanic Steam Navigation Company, Limited, against Andrew W. Mellon, and others, it is, on motion of Burlingham, Veeder, Masten & Fearey, Solicitors for the Complainant,

Ordered that until the determination of said motion by entry of order thereon the defendants, their successors, agents, servants and subordinates, and each of them, be, and hereby are, restrained from seizing, disturbing, removing or in any way interfering with wines, liquors or other intoxicating beverages on board complainant's ships as sea stores or medicines, as more particularly set forth in the said bill of complaint herein; from seizing, disturbing or in any way interfering with the complainant's ships by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages as ship's stores, as more particularly set forth in said bill of complaint, and from enforcing or attempting to enforce, or causing

be enforced against the complainant, its officers, agents or servants, or any of them, or any of its steamships, any of the pains, penalties or forfeitures provided in and by the so-called National Prohibition Act enacted by Congress pursuant to the Eighteenth Amendment to the Federal Constitution; and from refusing to issue to complainant or its steamers, permits for clearance from the Port of New York, or in any way interfering with the arrival or departure of any of the complainant's steamers, by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages, as said ship's stores, as more particularly set forth in the bill of complaint herein; and on like motion, it is further

Ordered that service of a copy of this order on the United States Attorney for the Southern District of New York shall be sufficient.

Dated, New York, October 21st, 1922.

LEARNED HAND,  
*United States District Judge.*

34 & 35 [Endorsed:] E. 25-28. District Court of the United States, Southern District of New York. The Royal Mail Steam Navigation Company, Complainant, vs. Andrew W. Mellon and others, Defendants. Copy. Restraining Order. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

Sir: Take notice that the original of which the within is a copy, was this day duly filed herein in the office of the clerk of this Court.

Dated, New York, Oct. 21, 1922.

Yours, etc.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Proctors for ———.*

27 William Street, Borough of Manhattan, New York City.

To ———, Proctor for ———.

36 United States District Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE  
(HENDERSON BROTHERS), LTD.,

against

ANDREW W. MELLON, Secretary of the Treasury of the United  
States, et al.,

And Ten Other Cases.

*Opinion.*

Oct. 23, 1922.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decrees upon the answers. The pleadings have been so drawn on both sides as to raise the merits of the controversy, and it is not necessary to set them forth in detail.

The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and liquors as part of their sea-stores. This was done with the consent of the public authorities who promulgated regulations recognizing the practise, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an opinion at that time given by the Attorney General, was that, as part

37 of the ship's stores, these wines and liquors, if sealed and kept on board, were not to be regarded as brought within the country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where the peace of the sovereign is at stake. Later the permission so given was further extended to allow the ships to dispense to their crews their customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of *Grogan v. Walker*, and *Anchor Line v. Aldridge*, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying to and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed



execute the law in accordance with this opinion, and this created the situation out of which these bills arise.

The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in Europe so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal, and carried out again, only for the entertainment of passengers embarking from the United States. Besides the wines and liquors so used the steamers carry a stock for the use of their crews. In the case of the French, Italian and Belgian ships the law of their flag requires them to supply a ration of wine and in those cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore, the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign lines; they have freely sold their wines and liquors at sea and brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some cases the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the Zone Officer, but the Collector of the Port of New York and the local Prohibition Director are defendants in all.

#### Appearances:

Hon. Van Vechten Veeder, for Oceanic Steam Navigation Co., Ltd., Liverpool, Brazil & River Plate Steam Navigation Co., Ltd., United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., the Netherlands American Steamship Co., (Holland America Line) and Pacific Steam Navigation Company.

Lucius H. Beers, Esq., for The Cunard Steamship Co., Ltd., and Anchor Line (Henderson Brothers).

Joseph P. Nolan, Esq., for Compagnie Generale Transatlantique.

Reid L. Carr, Esq., for United American Lines, et al.

Cleatus Keating, Esq., and John M. Woolsey, Esq., for International Mercantile Marine and International Navigation Co., Ltd.

William Hayward, Esq., United States Attorney, and John Holley Ark, Esq., Assistant U. S. Attorney, for Defendants in all cases.

#### LEARNED HAND, D. J.:

It is conceded, and indeed could not be disputed, after *Grogan v. Walker and Anchor Line v. Aldridge*, decided May 15, 1922, that, and the liquors here in question been a part of the ship's cargo, the bills would not lie. It makes no difference that they were not to be touched while carried within territory of the United States; the

carriage would be transportation none the less. But because they are part of the ship's stores, in the sense that that term is generally understood, the plaintiffs argue that they do not fall within the same rule. This argument rests upon two alternative premises, first, that "transportation" involves a place where, and a person to whom, the goods are to be delivered, and second, that a ship's stores have by long custom been treated as a part of the "furniture," *Brough v. Whitmore*, 4 Term R. 206, or "appurtenances," *The Dundee*, 1 Hagg. Adm. 109, of the ship, which do not without particular mention become subject to the municipal law of the ports into which she enters, any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I do not see how that would help the plaintiffs. These liquors are carried for delivery at sea to the passengers and crew, and when so delivered their transportation ends. There appears to me no significant distinction in the fact that the place of delivery is the ship itself. The passengers, and for that matter, the crew, are not the same person as the owner, and if the passage of title or possession has anything to do with the matter, the title to, and possession of, the bottle or the dram, passes when it is handed to its consumer. The carriage within the limits of the Port of New York is a part of a transit whose purpose from the beginning is that very delivery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to search out and coal at sea friendly cruisers during war, as happened in 1914.

Therefore, I might admit the plaintiffs' interpretation of the word, if it were necessary. Nevertheless, it seems to me at best very doubtful whether it carries with it any such limitation. The cases on which the plaintiffs rely come only to this, that the jurisdiction of the United States under the interstate commerce clause does not terminate until delivery after a transit across State lines, *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196, *Rhodes v. Iowa*, 170 U. S. 412, *Louisville & Nashville R. R. v. Cook Brewing Co.*, 223 U. S. 70, *Danciger v. Cooley*, 248 U. S. 319. From this it does not follow that the term, "transportation," as used in this statute, implies delivery to another than the person who carries the liquors. Suppose, for example, a parcel of liquor, made after the Amendment, and carried off to be laid away in a cache. There can be no question, I believe, that two separate crimes would be committed, "manufacture" and "transportation."

Nor does it seem to me that the thirteenth and fourteenth sections of Title II of the Prohibition Act, help the plaintiffs. Under these carriers are required to mark the consignor's and consignee's names on the outside of all packages. But it does not follow that a regulation like this of one kind of transportation imputes to the word itself any of the conditions which it enacts. In common use to transport means to carry about, and I see no reason why it should mean less in Section three. The law clearly intended by immobilizing

liquor to make surreptitious traffic in it impossible, and in policy would as well cover movements which might be incidental to, as those which immediately terminated in, a de

livery to someone else. The case of *Street v. Lincoln Safe Deposit Company*, 254 U. S. 88, did not decide anything to the contrary; it turned upon the fact that the possession of the liquor in the leased room and in the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as *Street* had, for the possession of the liquor. I conclude therefore that the carriage in question is "transportation."

The first point being thus disposed of, I come to the second. It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States, (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they must be manifested and may not be excessive in quantity, as such they are not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbade generally the transportation of liquors, it must be read in the light of this statute and the long usage under it, and that what is not within the United States for the purposes of customs ought not to be so for purposes of prohibition. In addition they urge that under the maritime law it is held that for most purposes sea-stores will be treated as a part of the ship herself. If she is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and least of all a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to these, *Brown v. Duchesne*, 19 How. 183, *Taylor v. U. S.*, 207 U. S. 120, *Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122. Nevertheless, everyone must agree that the question is no more than one of interpretation, for in the cases at bar Congress certainly might, if it chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

*Grogan v. Walker*, *supra*, and *Anchor Line v. Aldridge*, *supra*, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thoroughly-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under

the Amendment, and its very want of particularity is a good index that it meant to cover what it could. For this reason it is to be distinguished from earlier local acts of the same kind, as for example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful, since in form it only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the policy, and not the promise, of the nation. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

44 However, the motives for positively assuming that such stores must be considered as included within Section three appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legislative motives is speculative, but that vice, if it be one, is of the plaintiffs' making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitations on that meaning, because of the supposed intent of Congress. Since, therefore, I am asked to have recourse to implications, I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises.

In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan v. Walker*, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the

case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the law runs for all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of the stocks are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law. The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question; it must be enough for him that each is forbidden.

It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the section covered some of such stores, but not all, would be to admit that as much they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress may indeed determine to make an exception in their favor, to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties in which its absence leaves the plaintiffs. There is a nar-

row limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crew's rations stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later.

Cases like *Brown v. Duchesne*, supra, *Taylor v. U. S.*, supra, and *Scharrenberg v. U. S.*, supra, are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves

from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they

therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning of Section three accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is *sui generis*, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages. It is true that the prayers for relief do include so much, but prayers without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs than anything I may think about the law. The power under

the Seventy-fourth Rule to grant such an order is un-

doubted, notwithstanding a dismissal of the bill, *Merriman River Savings Bank v. City of Clay Center*, 219 U. S. 527, *Stafford v. King*, 90 Fed. R. 136 (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he holds his decree. Like all such matters, it depends upon a balance between the two, and I must now assume that the chances of success are not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some nicety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far as the loss of the liquors themselves is concerned the damage



cannot be said to be irreparable. These must be condemned before they can be forfeited, and in the present state of the calendars the cases at bar will be finally determined long before such libels can be tried. If I am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the long acquiescence of the authorities in the practices here in question will moderate the ultimate penalty of confiscation; I must assume that the plaintiffs will receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as part of the crew's ration. If the ration is cut off, some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages to stay the enforcement of the law against stocks of wine and liquor necessary for crew's rations, if honestly kept and dispensed for that purpose alone.

As to the maintenance of passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing inter se and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is my duty to say, if one does not take seriously the opinion behind the amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury which no judge has the right to ignore. The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is.

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge, the plaintiffs have no case. Therefore I will go no further than to issue an injunction against inter-



fering with the carriage of a stock necessary for the crews' rations on the east-bound voyage. The plaintiffs must each give a bond for the sum of twenty-five thousand dollars, conditional against the sale of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal, if the same be taken at once. Settle orders on notice.

October 23, 1922.

LEARNED HAND,

D. J.

- 51 At a Stated Term of the District Court of the United States for the Southern District of New York held in the Court Rooms thereof, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 25th day of October, 1922.

Present: Hon. Learned Hand, District Judge.

THE ROYAL MAIL STEAM PACKET COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States  
Henry C. Stuart, Acting Collector of the Customs of the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Final Decree.*

October 25th, 1922.

This cause came on to be heard at this term upon motions by the defendants to dismiss the bill of complaint and by the complainant for a final decree in its favor on the pleadings, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the bill of complaint be dismissed and defendants have judgment against the complainant for their costs to be taxed, and it is further

Ordered, adjudged and decreed that until final hearing of this cause in the Supreme Court of the United States and the entry of an order or decree on the mandate of that Court, the defendants, their

- 52 servants, agents and subordinates, be and they thereto stay and restrained from seizing or interfering with the possession or carriage by complainant herein of a stock of liquors customary for the rations of the crews of complainant's vessels upon each eastbound voyage, upon the filing of a bond in penal sum of twenty-five thousand dollars (\$25,000), conditional against the gift, issuance or sale of such stock of liquors by complainant otherwise than as crews' rations to the crews of complainant's vessels; and it is further

Ordered, adjudged and decreed that if complainants shall fail to take an appeal herein to the Supreme Court of the United States within five days from the entry hereof, or to move for preference on the first motion day of the Supreme Court, the defendants may move herein to vacate the injunction granted above.

LEARNED HAND,  
U. S. D. J.

3 & 54 [Endorsed:] E. 25-28. District Court of the United States, Southern District of New York. The Royal Mail Steam Packet Co., Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs of the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants. Copy. Final Decree. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

5 In the District Court of the United States for the Southern District of New York.

THE ROYAL MAIL STEAM PACKET COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Assignment of Errors.*

The complainant hereby assigns error in the final judgment or decree of the District Court herein entered October 25, 1922, in the following respects:

First. The Court erred in dismissing the bill of complaint herein.

Second. The Court erred in denying the petition for an injunction.

Third. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States prohibits a foreign ship from keeping on board while on the territorial waters of the United States intoxicating beverages constituting part of the customs and sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fourth. The Court erred in holding that the National Prohibition Act prohibits a foreign ship from keeping on board, while on the territorial waters of the United States, intoxicating beverages con-

stituting part of the customary sea stores of such ship law-  
 56 fully acquired by it in a foreign jurisdiction and on board  
 solely for the lawful use and consumption thereof on board  
 said ship outside of the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amend-  
 ment and the National Prohibition Act prohibit a foreign ship from  
 having on board as sea stores while on the territorial waters of the  
 United States such intoxicating beverages as are required for the  
 crew as part of their customary rations by the law of the ship's flag  
 or by the law of the nation to or from whose ports the vessel is  
 trading when said sea stores were lawfully acquired and taken on  
 board for such purpose in a foreign country.

Sixth. The Court erred in holding that the Eighteenth Amend-  
 ment and the National Prohibition Act prohibited a foreign ship  
 from having on board as sea stores while on the territorial waters  
 of the United States such intoxicating beverages as are required  
 for the passengers as part of their customary rations by the law  
 of the ship's flag or by the law of the nation to or from whose ports  
 the vessel is trading when said sea stores were lawfully acquired and  
 taken on board for such purpose in a foreign country.

Seventh. That the National Prohibition Act as construed and ap-  
 plied by the District Court is unconstitutional and void because en-  
 forcement thereof with respect to sea stores on the complainant's  
 vessels would deprive the complainant of its property and subject  
 it to penalties without due process of law.

Eighth. The Court erred in holding that the keeping on board  
 of complainant's vessels of intoxicating beverages while said vessels  
 are on the territorial waters of the United States in the circumstances  
 mentioned in the third and fourth assignments of error con-  
 57 stitutes a transportation of the same within the prohibition  
 of the Eighteenth Amendment and the National Prohibition  
 Act.

Ninth. The Court erred in holding that the keeping on board of  
 complainant's vessels of intoxicating beverages while said vessels  
 are on the territorial waters of the United States in the circumstances  
 mentioned in the Fifth and Sixth Assignments of error constitute  
 a transportation of the same within the prohibition of the Eighteenth  
 Amendment and the National Prohibition Act.

Tenth. The Court erred in holding that the possession within the  
 territorial waters of the United States of intoxicating beverages in  
 the circumstances mentioned in the Third, Fourth, Fifth and Sixth  
 assignments of error is prohibited by the Eighteenth Amendment  
 and the National Prohibition Act.

Eleventh. The Court erred in refusing to hold that the interpreta-  
 tion of the National Prohibition Act mentioned in the Ninth as-  
 signment of error was unconstitutional and invalid and not within  
 the powers conferred by Congress by the Constitution.

Wherefore, complainant-appellant prays that said decree or judgment of the United States District Court for the Southern District of New York be reversed and an injunction granted the complainant as prayed for in the bill of complaint herein, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
*Solicitors for Complainant.*

[Endorsed:] E. 25-28. District Court of the United States, Southern District of New York. The Royal Mail Steam Packet Company, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants. Copy. Assignment of Errors. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

In the District Court of the United States for the Southern District of New York.

THE ROYAL MAIL STEAM PACKET COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Petition for Appeal and Allowance.*

The complainant above named, The Royal Mail Steam Packet Company, conceiving itself aggrieved by the final judgment and decree entered herein October —, 1922, does hereby appeal from said final judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, from which it appears that this cause is appealable directly from this court to the said Supreme Court under Section 28 of the Judicial Code, and said The Royal Mail Steam Packet Company prays that it be allowed this appeal and that a transcript of the record papers and proceedings upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
*Solicitors for Complainant.*

The foregoing appeal is hereby allowed as prayed for.

LEARNED HAND,  
U. S. D. J.

To Hon. William Hayward, United States Attorney; Alexander Gilchrist, Jr., Esq., Clerk, United States District Court, Southern District of New York.

61 & 62 [Endorsed:] E. 25-28. District Court of the United States, Southern District of New York. The Royal Mail Steam Packet Company, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Petition for Appeal. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

63

*Citation on Appeal.*

By the Honorable Learned Hand, One of the United States District Judges for the Southern District of New York, in the Second Circuit, to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court to be holden at Washington, in the District of Columbia, on the 20th day of November, 1922, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein The Royal Mail Steam Packet Company is complainant and you are defendants to show cause, if any there be, why the decree in said cause mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 25th day of October, in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

LEARNED HAND,

*United States — Judge for the Southern  
District of New York, in the Second Circuit.*

[Endorsed:] E. 25-28. United States District Court, Southern District of New York. The Royal Mail Steam Packet Company, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Citation. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, City of New York.

64 In the District Court of the United States for the Southern District of New York.

THE ROYAL MAIL STEAM PACKET COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, Defendants.

*Stipulation.*

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of said District Court in the above entitled matter as agreed on by the parties.

Dated: New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY, *Solicitors for Complainant.*  
WM. HAYWARD,  
*U. S. Atty., Attorney for Defendants.*

65 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

THE ROYAL MAIL STEAM PACKET COMPANY, Complainant,  
vs.

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 25th day of October, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of the District Court of the United States, Southern District of N. Y.]

ALEX GILCHRIST, JR., *Clerk.*

Endorsed on cover: File No. 29,218. S. New York D. C. U. S. Term No. 668. The Royal Mail Steam Packet Company, appellant, vs. Andrew W. Mellon, Secretary of the Treasury of the United States, et al. Filed October 27th, 1922. File No. 29,218.

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

**No. 669.**

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UNITED STEAMSHIP COMPANY OF COPENHAGEN (SCANDINAVIAN AMERICAN LINE), APPELLANT,

*vs.*

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, ET AL.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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FILED OCTOBER 27, 1922.

**(29,319)**



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 669.

UNITED STEAMSHIP COMPANY OF COPENHAGEN (SCANDINAVIAN AMERICAN LINE), APPELLANT,

*vs.*

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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1

The President  
Secretary  
Acting Clerk  
John D. ...

You are hereby  
District Court of  
of New York  
prohibited against  
Steamship Company  
and to further  
considered in the  
penalty on your  
(\$250).

Witness, my hand  
the United States  
of New York  
Nine Hundred  
United States

BURLINGAME  
FEARNSIDE  
Company

The defendant  
in the above  
day after service  
the bill aforesaid

[SEAL.]

*Equity Subpœna.*

the President of the United States of America to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by United Steamship Company of Copenhagen (Scandinavian American Line), and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you, of Two Hundred and Fifty Dollars (250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 19th day of October, in the year One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

ALEX GILCHRIST, JR.,

*Clerk.*

CURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Complainant's Sol'rs.*

The defendants are required to file their answer or other defense to the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX GILCHRIST, JR.,

*Clerk.*

2 In the United States District Court for the Southern District  
of New York.

In Equity.

UNITED STEAMSHIP COMPANY OF COPENHAGEN (Scandinavian  
American Line), Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and John D. Appleby, Chief Zone Officer, Defendants

*Bill of Complaint.*

To the Honorable the Judges of the District Court of the United  
States for the Southern District of New York, Sitting in Equity:

The complainant United Steamship Company of Copenhagen  
(Scandinavian American Line) brings this its Bill of Complaint  
against the above-named defendants, and respectfully shows as  
follows:

I. Complainant, the United Steamship Company of Copenhagen  
(Scandinavian American Line), is a corporation duly organized and  
existing under the laws of the Kingdom of Denmark, with its principal  
place of business in Copenhagen, Denmark.

II. Complainant is informed and verily believes and therefore  
relies on information and belief:

The defendant Andrew W. Mellon is Secretary of the Treasury  
of the United States, and he is, and his subordinates are, charged  
with the duty of enforcing the terms and provisions of the Acts of  
Congress passed under the authority of the Eighteenth Amendment  
to the Constitution of the United States and the making of Regulations  
promulgated for the purpose of enforcing such Acts of Congress.

The defendant Henry C. Stuart is a subordinate of said Secretary  
of the Treasury, and is Acting Collector of Customs for the port of  
New York, and said defendant is by law charged with the  
3 duty of enforcing the terms and the provisions of the Acts of  
Congress and the regulations and decisions of the Secretary  
of the Treasury, which from time to time may be promulgated  
within the port of New York wherein the complainant desires  
bring its vessels equipped with certain sea stores as hereinafter set  
forth.

The defendant John D. Appleby is a citizen and resident of the  
State of New York and is Zone Officer for this Zone, and said  
defendant is by law charged with the duty of enforcing the terms and  
provisions of the Acts of Congress and the regulations and decisions  
of the Secretary of the Treasury hereinbefore referred to, and

jurisdiction in the Port of New York, both in the States of New York and New Jersey.

III. This is a suit of a civil nature arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three thousand dollars (\$3,000) in value, exclusive of interest and costs.

IV. Complainant is a foreign corporation organized under the laws of the Kingdom of Denmark for the purpose of carrying on a steamship business, and for very many years has been engaged in the business of transporting as common carrier passengers and cargo for hire on the high seas, and in transacting such business the complainant maintains and operates a fleet of steamships in overseas trades between Scandinavian and Danish ports and ports of the United States.

All the complainant's steamships are Danish vessels, flying the Danish flag. The complainant owns four passenger steamers of a total gross tonnage of approximately 42,000 tons, and 113 freight steamers of a total gross tonnage of approximately 139,000 tons. All said passenger steamers trade regularly between Scandinavian ports and the port of New York. A regular freight service is also maintained between Scandinavian ports and the ports of Boston, New York, Philadelphia, Baltimore, Savannah and New Orleans. Said passenger steamers as well as said freight steamers are worth many millions of dollars, and any interruption of their said services would cause great loss and damage to the complainant, the extent of which it is impossible to estimate. Complainant's principal office in the United States is located in the City of New York and it occupies piers in the port of New York at Hoboken. It also has pier accommodations at the port of New Orleans and offices in other ports of the United States.

V. The crews operating complainant's vessels, including those carrying passengers and cargo and those carrying cargo alone, are made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic liquors for beverage purposes is not prohibited and by whose customs the use of alcoholic liquors for beverage purposes is so widespread that complainant believes it would experience the greatest difficulties in obtaining adequate crews to operate its vessels running in the United States if it were prohibited from furnishing a usual and reasonable amount of liquor to members of the crews.

VI. By local regulations in force as to Danish vessels they are required to have on board a certain amount of liquor for medicinal and emergency use.

Among passenger vessels regularly crossing the North Atlantic from European ports are many which land at Canadian ports, and your complainant is prohibited from furnishing its passengers with alcoholic beverages it believes a large number of passengers who would otherwise have patronized complainant's ships will patronize ships landing at Canadian ports.

A considerable portion of passengers traveling to and from the United States by complainant's ships consist of through passengers from one foreign country to another, by way of the United States. As those passengers are largely foreigners, accustomed to the use of wines and liquors with their meals, if complainant is prevented from furnishing wines and liquors to them while on the high seas, it is believed they will travel by steamers of other lines not touching at United States ports.

VII. The prohibition of the use of alcoholic liquors on complainant's vessels as sea stores, for the reasonable use of crew and passengers, it is believed, would cause your complainant great pecuniary loss by reason of the difficulty of obtaining crews, and would cause an annual loss of receipts from passenger business of many thousand dollars a year, and will involve irreparable damage to your complainant, in that it will destroy a considerable part of its business and render a considerable part of its equipment useless and cause a loss of its profits.

VIII. It has at all times heretofore been the practice of complainant's vessels, in common with other Danish vessels, to carry as part of their sea stores certain wines, liquors, and other intoxicating beverages for consumption by the vessel's passengers and crew. 6 such sea stores, including such wines, liquors and other intoxicating beverages, being the property of the complainant and on board solely for such consumption on board and not for transportation or landing in the United States or elsewhere, and upon arrival of any vessel in the United States an accurate list of all such sea stores, including such wine, liquors and other intoxicating beverages, being furnished to the United States authorities. None of the intoxicating liquors so kept at sea stores for reasonable use of passengers and crew have been manufactured, sold or transported within, imported into, or exported from the United States or any territory subject to the jurisdiction of the United States. All wines and other intoxicating liquors kept as sea stores on complainant's vessels as aforesaid have been legally acquired.

Since the adoption of the so-called National Prohibition Act of October 28, 1919, complainant's ships have been permitted freely to come and go in the port of New York and other ports and territorial waters of the United States with such sea stores, including such wines, liquors and other intoxicating beverages, on board, under regulations of the Secretary of the Treasury, copies of which are annexed hereto and marked Schedules A and B and made a part hereof. In reliance upon and under the authority of the above mentioned Treasury Decision and the Regulations promulgated in connection therewith and the procedure always followed as above described, complainant in good faith purchased in foreign ports and now have on board their vessels on the high seas bonds for the United States, as sea stores, quantities of intoxicating liquors of a value in excess of Three Thousand Dollars (\$3,000). The complainant has at all times been ready and willing to conform to

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has conformed to, such regulations, and upon arrival of any of complainant's vessels within the jurisdiction of the United States such vessel has immediately been boarded by the United States customs officials, who thereupon placed such wines, liquors and other intoxicating beverages under seal and assumed exclusive control thereof until the same were unsealed by such customs officials upon the vessel's again leaving the jurisdiction of the United States.

X. All of the alcoholic liquors carried as such sea stores on complainant's vessels are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for sea stores is taken on board complainant's vessels at foreign ports, and no part of such liquors is intended to be landed in the United States.

XI. On or about October 5, 1922, as complainant is informed and believes, the Attorney General of the United States transmitted an opinion to the Secretary of the Treasury in which, among other things, he stated that the sale, transportation or possession of intoxicating liquors for beverage purposes on foreign vessels while in territorial waters of the United States is prohibited by said National Prohibition Act. Thereafter the President of the United States directed that said National Prohibition Act be enforced in accordance with said opinion of the Attorney General, and directed the Secretary of the Treasury to proceed to the formulation of regulations for the enforcement of said law in accordance with said opinion of the Attorney General with respect to foreign ships.

Complainant is informed and believes that the defendant, Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States and threaten to enforce the Prohibition Act as so interpreted by the Attorney General. By order of the President of the United States, as complainant is informed and believes, the said regulations will not apply to foreign vessels sailing for the United States on or before October 21. The complainant's passenger steamer United States, however sails from Copenhagen for the port of New York.

United States on October 26, and others of complainant's vessels will shortly from time to time thereafter be sailing from foreign ports for the United States, and, unless restrained, the defendants intend, as complainant is informed and believes, upon arrival of said vessels within the United States, to seize all wines, liquors or other intoxicating beverages on board and included in the sea stores of said vessels, and threaten also to seize the vessels themselves as being in violation of said National Prohibition Act and subject to the penalties therein provided; and any such seizure of said vessels, liquors or other intoxicating beverages constituting part of

said sea stores of said vessels for use and consumption of passengers and crews as aforesaid, or seizure of said vessels themselves, will disrupt the sailings of complainant's vessels, prevent the performance of obligations incurred in respect thereof, deprive the complainant of a large volume of patronage, and otherwise cause loss, damage and difficulties to the complainant, to its great and irreparable loss and injury; and will deprive the complainant of its property without due process of law.

XI. Complainant is advised by counsel, and verily believes, that the aforesaid ruling by the Attorney General in respect to foreign ships carrying intoxicating beverage liquors as ship's stores for crew or passengers as aforesaid, and any regulations formulated by the Secretary of the Treasury for the enforcement of such ruling, are and will be unauthorized and void because neither the Eighteenth Amendment nor the National Prohibition Act prohibits the carriage of such liquors as such sea stores for crew and passengers as aforesaid, and any interference with the carriage of such sea stores would, therefore, violate complainant's rights under the law and under existing treaties between the United States and the Kingdom of Denmark and would deprive the complainant of its property without due process of law.

XII. Complainant is advised by counsel, and verily believes, that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders said Act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional, and also would deprive complainant of its property without due process of law.

XIII. Complainant alleges that the defendant, Andrew W. Mellon, or his subordinates, are preparing regulations, and that pursuant to said opinion of the Attorney General or such regulations, the defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart and John D. Appleby are threatening notwithstanding the fact that the Interpretation of the Act of Congress, known as the National Prohibition Act, by the Attorney General is erroneous, unauthorized and void and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said National Prohibition Act, if it purports to prohibit the carriage of said alcoholic beverages as sea stores for crew and passengers, is unconstitutional and void for the reasons hereinabove stated, to seize said alcoholic liquors now constituting sea stores on complainant's vessels, and to enforce against the complainant, its officers, agents and servants, various pains and penalties, including

finer and imprisonment and various forfeitures of property provided by the Acts of Congress and regulations, and thus involve the complainant, its officers, agents and servants, in numerous suits and by such threats to prevent complainant, its employees and servants, from carrying out its contracts, and thus deprive the complainant of its business and its property without due process of law; all to the irreparable damage of complainant, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainant would be involved in numerous suits if it were forced to bring an action at law to relieve its employees and property from such penalty and forfeiture.

Forasmuch, therefore, as complainant is without remedy in the premises, except in a court of equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled, it respectfully prays that the above named defendants and each of them be directed to make a full, true and perfect answer to this bill of complaint but not under oath, an answer under oath being expressly waived, and that said defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainant, its officers, servants and employees, or any of them, or complainant's steamships, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General, and from arresting and prosecuting the complainant, its officers, agents, servants or employees, or any of them, and from refusing to issue to the complainant and/or its steamers permits for clearance from the port of New York, or in any

11 way interfering with the arrival or departure of the complainant's steamers, for or on account of any alleged violation by them, or any of them, or on account of any alleged violation by them, or any of them, of the Eighteenth Amendment or the National Prohibition Act, on the ground or claim that the carriage or possession of said intoxicating liquors as aforesaid as sea stores for crew and passengers is contrary to law; or from molesting or otherwise interfering with the complainant in the peaceful possession of said intoxicating liquors on board such vessels as part of their sea stores.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause whereby the defendants, their agents, servants, subordinates and employees, and each and every one of them be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainant further prays that a writ of subpoena be issued herein, directed to said defendants, commanding them on a day set, to appear and answer the bill of complaint herein.

UNITED STEAMSHIP COMPANY OF  
COPENHAGEN,  
By WILLIAM L. WALTHER,  
*Agent.*

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
*Solicitors for Complainant.*

27 William Street, New York City.

12 STATE OF NEW YORK,  
*County of New York, ss:*

William L. Walther being duly sworn, says:

I am managing agent at New York for the United Steamship Company of Copenhagen. I have read the foregoing Bill of Complaint and know the contents thereof, and the same is true to the best of my knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters I believe it to be true. The reason why this verification is not made by the complainant is that it is a foreign corporation.

WILLIAM L. WALTHER.

Sworn to before me, this 16th day of October, 1922.

EDWIN M. BRENGLE,  
*Notary Public.*

Queens Co. No. 3072.

New York Co. Clerk's No. 856.

Reg. No. 4613.

Commission expires March 30, 1924.

13 & 14 [Endorsed:] E. 25-32. District Court of the United States, Southern District of New York. In Equity. United Steamship Company of Copenhagen (Scandinavian American Line) Complainant, vs. Andrew W. Mellon and Others, Defendants. Copy Bill of Complaint. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, Proctors for —. 27 William Street, Borough of Manhattan, New York City.

SIR:

Take notice that the original B/complaint of which the within is a copy, was this day duly filed herein in the office of the clerk of this Court.

Dated, New York, 10-19-22.

Yours, etc.,

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
*Proctors for —.*

27 William Street, Borough of Manhattan, New York City.

To — —, Proctor for —.

U. S. District Court, Southern District of New York.

E 25/32.

UNITED STEAMSHIP COMPANY OF COPENHAGEN (Scandinavian  
American Line), Complainant,

versus

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Notice of Appearance and Demand.*

You will please take notice that I am retained by, and appear as attorney for, the Defendants in this action, and demand service of a copy of the complaint and all papers in this action upon me, at my office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours,

WILLIAM HAYWARD,  
*United States Attorney.*  
*Attorney for Defendant.*

New York, October 20, 1922.

To Messrs. Burlingham, Veeder, Masten & Feary,  
27 William Street.

Attorney for Plaintiff.

[Endorsed:] E 25-32. U. S. District Court, Southern District of New York. United Steamship Company of Copenhagen (Scandinavian American Line) versus Andrew W. Mellon.  
Notice of Appearance. William Hayward, United States

Attorney, Attorney for Defendant. Due service of a copy of the within Notice is hereby admitted. Dated the 20 day of October 1922. ———, Plaintiff's Attorney. To Messrs. Burlingham Veeder, Masten & Feary, 27 William Street, Plaintiff's Attorney.

18 In the District Court of the United States for the Southern District of New York.

E 25-32.

UNITED STEAMSHIP COMPANY OF COPENHAGEN (Scandinavian American Line), Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Answer to Bill of Complaint.*

Now come the defendants herein and in answer to the bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the bill of complaint herein and divers parts thereof be dismissed, and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued here.
2. The Court has no jurisdiction to grant the relief prayed for in any part thereof.
3. The bill does not present a cause of action in equity under the Constitution of the United States.
4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.
5. The facts alleged in the bill are insufficient to constitute a cause of action in equity.
6. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

19 Second. In answer to the allegations set out in paragraph seventh of the complaint the defendants allege on information and belief that any difficulty which complainant might experience in obtaining adequate crews from among the nationals of countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread would be readily obviated by the payment of higher wages to said crews. Defendants are further informed

believe that many of the vessels of the American merchant marine carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages and that the said American vessels have never had the least difficulty in obtaining adequate crews from the nationals of such countries at the same wages paid to American crews.

Third. Defendants deny the allegations contained in paragraph seventh of the bill of complaint that the ruling by the Attorney General referred to in said paragraph is and any regulations for the enforcement of such ruling are and will be unauthorized and void. Defendants further deny the allegation that such ruling and such regulations would violate complainant's rights under existing treaties between the United States, Great Britain and otherwise.

Fourth. Defendants deny the allegation contained in paragraph eighth of the bill of complaint that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is correct, it renders said Act unconstitutional and void for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional. The defendants allege on the other hand that it is well within the powers Congress delegated to it by the Eighteenth Amendment to the Constitution of the United States to declare the possession of intoxicating liquor to be unlawful and that such legislative declaration contained in the National Prohibition Act is a valid exercise of the legislative power and has a reasonable relation to the enforcement of the constitutional mandate.

For a separate and distinct defense herein, defendants allege:

Fifth. Defendants re-allege and re-affirm as part of this separate and distinct defense each and every allegation contained in paragraphs first to fourth above.

Sixth. Defendants are informed by their attorney and therefore allege that if the complainant is correct in its construction of the National Prohibition Act the implications involved are exceedingly serious and the claim of the complainant, if allowed, would carry with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States.

Seventh. Defendants are further informed and believe and therefore allege that for two years last past a large and profitable business has been carried on by divers persons with the object and result of importing liquor into this country contrary to law; that the vessels used by such persons are vessels under foreign registry and such vessels sail from foreign ports with clearance papers showing that they are bound for other foreign ports. The actual destination of such vessels is not the port shown in



their clearance papers but some point on the high seas near the coast of the United States from which its liquors are transferred to smaller boats which complete the smuggling and importation of the liquor into the United States. Up to the present time the vigilance of the customs officials in seizing such vessels when they came within the territorial limits of the United States has somewhat mitigated the evils of this traffic but if, as complainant contends it is only necessary to put liquors under lock and key to make such transportation legal and foreign vessels can sail our territorial waters at will with cargoes of liquor, the enforcement of the prohibition against the importation of liquors, already difficult, will become practically impossible.

Eighth. The rulings of the Secretary of the Treasury referred to in the bill of complaint have already been used as a cloak to hide smuggling operations and if the doctrine underlying such rulings is declared to be the law as claimed by complainant, defendants verily believe that its use as a cloak for such operations will greatly increase. As an instance of the use of such regulations to hide smuggling defendants allege that on or about January 15, 1920, the British passenger steamship "Harbinger" sailed from Halifax, N. S. for Havana, Cuba, carrying with her a large quantity of intoxicating liquors listed as sea stores. The said vessel came into the port of Portland, Maine, alleging a shortage of coal, and there her liquor was sealed under customs seals. Her Master protested her innocence and claimed the right as a foreign vessel to transport intoxicating liquors as sea stores under seal within the territorial waters of the United States. This right was accorded her under the Treasury rulings until recently in force and on which complainant has relied until now. Being under suspicion, however, the "Harbinger" was convoyed by the coastguard cutter "Ossipee" to Cape Ann whence she entered the port of Boston and thence proceeded without convoy to the neighborhood of New York where she was met by the coastguard cutter "Gresham" which convoyed her to New York. On January 26th, she was convoyed down New York Bay by the coastguard cutter "Manhattan" to Dutchman Shipyard, Staten Island. There she remained under customs surveillance until February 6th when the customs seals on the liquors were broken by the crew and an attempt was made to import them into the United States. When such attempt was made the crew of said vessel were arrested. Two have pleaded guilty to the violation of the Prohibition Act and the vessel has been libelled by the Government. After the crew were arrested it became evident that the journey of this vessel down the coast of the United States was not, as alleged and as appeared, because of insufficient carrying space but for the purpose of finding purchasers of the liquor carried as sea stores.

Ninth. Defendants further allege that under the regulations of the Secretary of the Treasury referred to in the complaint herein customs officers have made no physical inventory of the stores of

liquors on any foreign ships either upon their arrival in the ports of the United States or upon their leaving such ports. Permission has been given to remove certain of the liquors under seal for the purpose of rations given to the crews, but no record is kept of the amount of liquor which actually leaves United States ports on foreign vessels, nor is any inventory returned by such foreign vessels of the amount of liquors actually found when seals are broken by the ship's agents after leaving port.

Tenth. Defendants are informed and verily believe that the complainant makes large profits from the sale of intoxicating liquors on the high seas, such profits amounting to many thousand dollars per annum and further allege that loss of such profit is the only definitely ascertainable loss which the complainant will suffer if the National Prohibition Act as interpreted by the ruling of the Attorney General is given full force and effect.

Eleventh. Defendants further allege on information and belief that the sale of intoxicating liquors on the high seas by vessels carrying the American flag ceased with the issuance of the ruling of the Attorney General and is not now carried on. And defendants verily believe that if vessels of foreign registry are by the injunction of this Court facilitated in the sale of liquor on the high seas by being allowed to transport liquor within the territorial waters of the United States, the resultant damage to the American merchant marine will be great and irreparable. Not only will ships of the American merchant marine suffer the loss of revenue which they have hitherto enjoyed from the sale of intoxicating liquors on the high seas and which ships of foreign nations will continue to enjoy if the prayer of the complainant herein is granted, but defendants believe that a large number of passengers who would otherwise travel on American ships and who would travel on American ships if both American ships and foreign ships were placed in the same position in regard to the sale of liquor on the high seas, will, if foreign ships are placed in an advantageous position in this regard travel on foreign ships and the American ships will lose a large amount of revenue thereby. Defendants are informed and verily believe that the loss of such revenue from the sale of liquor and from passage money in case of a differential treatment giving preference to foreign ships over American ships in the matter of transportation of intoxicating liquors within the territorial waters of the United States, will be sufficient to make it impossible for the American merchant marine to compete profitably with ships of foreign registry. The majority of the American passenger liners operating in the North Atlantic trade, in competition with complainant's and other foreign vessels are owned and operated directly by the United States Government. Any loss of revenue by reason of a differential treatment favorable to foreign ships will fall directly on the United States Government and its taxpayers.

Wherefore, defendants pray that the bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,  
*United States Attorney for the  
Southern District of New York,  
Attorney for Defendants.*

Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

25 United States District Court, Southern District of New York.

UNITED STEAMSHIP COMPANY OF COPENHAGEN, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Stipulation.*

The above entitled suit having been duly brought on for trial by consent of the parties, at a Stated Term of the United States District Court for the Southern District of New York, before the Honorable Learned Hand, District Judge, and a motion for a judgment on the pleadings having been made by the complainant, and the Court having heretofore, at a Stated Term thereof, held at the United States Post Office Building in the City of New York on the 17th day of October, 1922, before the Honorable Learned Hand, heard extended argument of counsel upon a similar motion in like suits by the Oceanic Steam Navigation Company, Ltd., and other complainants, involving similar questions;

It is stipulated that the said motion for judgment in the above entitled suit be, and the same hereby is, forthwith submitted without further argument for consideration and decision by the

26 Court, along with said suits of the Oceanic Steam Navigation Company, Ltd., and other complainants.

Dated, New York, October 19th, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY. *Solicitors for Complainant.*  
WILLIAM HAYWARD,  
*United States Attorney for the Southern District of New York, Solicitor for Defendants.*

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27 & 28 [Endorsed:] E. 25-32. District Court of the United States, Southern District of New York. United Steamship Company of Copenhagen, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Copy. Stipulation. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

29 In the District Court of the United States for the Southern District of New York.

UNITED STEAMSHIP COMPANY OF COPENHAGEN, Complainant,  
against

ANDREW MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of Customs for the Port of New York and John D. Appleby, Chief Zone Officer, Defendants.

*Restraining Order.*

A motion having been made in the above entitled case for judgment on the pleadings, and by agreement between the parties submitted to the Court for determination, along with a similar motion made in the suit of The Oceanic Steam Navigation Company, Limited, against Andrew W. Mellon and others, it is, on motion of Burlingham, Veeder, Masten & Fearey, Solicitors for the complainant,

Ordered that until the determination of said motion by entry of order thereon, the defendants, their successors, agents, servants and subordinates, and each of them, be, and hereby are, restrained from seizing, disturbing, removing or in any way interfering with wines, liquors or other intoxicating beverages on board complainant's ships as sea stores or medicines, as more particularly set forth in the said bill of complaint herein; from seizing, disturbing or in any way interfering with the complainant's ships by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages as ship's stores, as more particularly set forth in said bill of complaint, and from enforcing or attempting to enforce, or causing to be enforced against the complainant, its officers, agents or servants, or any of them, or any of its steamships, any of the pains,

penalties or forfeitures provided in and by the so-called National Prohibition Act enacted by Congress pursuant to the Eighteenth Amendment to the Federal Constitution; and from refusing to issue to complainant or its steamers, permits for clearance from the port of New York, or in any way interfering with the arrival or departure of any of the complainant's steamers, or reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages, as said ship's stores, as more particularly set forth in the bill of complaint herein; and on like motion, it is further

Ordered that service of a copy of this order on the United States Attorney for the Southern District of New York shall be sufficient.

Dated, New York, October 21, 1922.

LEARNED HAND,  
*United States District Judge.*

31 & 32 [Endorsed:] E. 25-32. District Court of the United States, Southern District of New York. United Steamship Company of Copenhagen, Complainant, vs. Andrew Mellon and others, Defendant. Copy. Restraining Order. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

SIR:

Take notice that the original of which the within is a copy, was this day duly filed herein in the office of the clerk of this Court.

Dated, New York, Oct. 21, 1922.

Yours, etc.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY.

*Proctors for ———.*

27 William Street, Borough of Manhattan, New York City.

33 United States District Court, Southern District of New York

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE  
(HENDERSON BROTHERS), LTD.,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States, et al.

And Ten Other Cases.

*Opinion.*

Oct. 23, 1922.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decrees upon the answers. The pleadings have been so drawn on both sides as to raise the merits of the controversy, and it is not necessary to set them forth in detail.

The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and

liquors of the practice of the theory

country the general foreign where the given crews the by the la

This Court de Aldridge United ment. in October Treasury and out publicly execute t situation

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liquors as part of their sea-stores. This was done with the consent of the public authorities who promulgated regulations recognizing the practice, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an opinion at that time given by the Attorney General, was that, as part of the ship's stores, these wines and liquors, if sealed and kept on board, were not to be regarded as brought within the country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where the peace of the sovereign is at stake. Later the permission so given was further extended to allow the ships to dispense to their crews their customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of *Grogan v. Walker*, and *Anchor Line v. Aldridge*, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration, on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying in and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed to execute the law in accordance with this opinion, and this created the situation out of which these bills arise.

The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in Europe so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal, and carried out again, only for the entertainment of passengers embarking from the United States. Besides the wines and liquors so used the steamers carry a stock for the use of their crews. In the case of the French, Italian and Belgian ships the law of their flag requires them to supply a ration of wine and in those cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore, the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign ones; they have freely sold their wines and liquors at sea and brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some cases the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the

Zone Officer, but the Collector of the Port of New York and the local Prohibition Director are defendants in all.

#### Appearances:

Hon. Van Vechten Veeder, for Oceanic Steam Navigation Co., Ltd., Liverpool, Brazil & River Plate Steam Navigation Co., Ltd., United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., The Netherlands American Steamship Co. (Holland America Line), and Pacific Steam Navigation Company.

Lucius H. Beers, Esq., for the Cunard Steamship Co., Ltd., and Anchor Line (Henderson Brothers).

Joseph P. Nolan, Esq., for Compagnie Generale Transatlantique.

Reid L. Carr, Esq., for United American Lines, et al.

Cleatus Keating, Esq. and John M. Woolsey, Esq., for International Mercantile Marine and International Navigation Co., Ltd.

William Hayward, Esq., U. S. Atty.

And John Holley Clark, Esq., Ass't U. S. Atty. for Defts. in all cases.

#### 36 LEARNED HAND, D. J.:

It is conceded, and indeed could not be disputed, after *Grogan v. Walker and Anchor Line v. Aldridge*, decided May 15, 1922, that had the liquors here in question been a part of the ships' cargo, the bills would not lie. It makes no difference that they were not to be broached while carried within territory of the United States; the carriage would be transportation none the less. But because they are part of the ships' stores, in the sense that that term is generally understood, the plaintiffs argue that they do not fall within the same rule. This argument rests upon two alternative premises, first, that "transportation" involves a place where, and a person to whom, the goods are to be delivered, and second, that a ship's stores have by long custom been treated as a part of the "furniture," *Brough v. White*, more, 4 Term R. 206, or "appurtenances," *The Dundee*, 1 Hag. Adm. 109, of the ship, which do not without particular mention become subject to the municipal law of the ports into which she enters any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I do not see how that would help the plaintiffs. These liquors are carried for delivery at sea to the passengers and crew, and when delivered their transportation ends. There appears to me no significant distinction in the fact that the place of delivery is the ship itself. The passengers, and for that matter, the crew, are not the same person as the owner, and if the passage of title or possession has anything to do with the matter, the title to, and possession of, the bottle or the dram, passes when it is handed to its consumer. The carriage within the limits of the Port of New York is a part of the transit whose purpose from the beginning is that very delivery.

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ery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to search out and coal at sea friendly cruisers during war, as happened in 1914.

Therefore, if it is doubtful upon which of the United States' termination of the Ferry Co. Louisville Danciger that the delivery to a for example carried off believe, the "pure" and Nor do the actions of T these, carriage names on regulation word itself to transport mean less ing as its side delivery to Company turned u room and from one cases at ba possession the statute had, for the carriage in The first is a very full within that for the enforced ignored in Since 1799 United States reasonable e manifest re not reg plaintiffs s prohibition must be re



Therefore, I might admit the plaintiffs' interpretation of the word, if it were necessary. Nevertheless, it seems to me at best very doubtful whether it carries with it any such limitation. The cases on which the plaintiffs rely come only to this, that the jurisdiction of the United States under the interstate commerce clause does not terminate until delivery after a transit across State lines, *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196, *Rhodes v. Iowa*, 170 U. S. 412, *Louisville & Nashville R. R. v. Cook Brewing Co.*, 223 U. S. 70, *Daneiger v. Cooley*, 248 U. S. 319. From this it does not follow that the term, "transportation," as used in this statute, implies delivery to another than the person who carries the liquors. Suppose, for example, a parcel of liquor, made after the Amendment, and carried off to be laid away in a cache. There can be no question, I believe, that two separate crimes would be committed, "manufacture" and "transportation."

Nor does it seem to me that the thirteenth and fourteenth sections of Title II of the Prohibition Act, help the plaintiffs. Under these, carriers are required to mark the consignor's and consignee's names on the outside of all packages. But it does not follow that a regulation like this of one kind of transportation imputes to the word itself any of the conditions which it enacts. In common use to transport means to carry about, and I see no reason why it should mean less in Section three. The law clearly intended by immobilizing liquor to make surreptitious traffic in it impossible and its policy would as well cover movements which might be incidental to, as those which immediately terminated in, a delivery to someone else. The case of *Street v. Lincoln Safe Deposit Company*, 254 U. S. 88, did not decide anything to the contrary; it turned upon the fact that the possession of the liquor in the leased room and in the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as *Street* had, for the possession of the liquor. I conclude therefore that the carriage in question is "transportation."

The first point being thus disposed of, I come to the second. It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States, (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they must be manifested and may not be excessive in quantity, as such they are not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbade generally the transportation of liquors, it must be read in the light of this statute and the long usage under it,

39 and that what is not within the United States for the purposes of customs ought not to be so for purposes of prohibition. In addition they urge that under the maritime law it is held that for most purposes sea-stores will not be treated as a part of the ship herself. If she is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and least of all a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to these, *Brown v. Duchesne*, 19 How. 183, *Taylor v. U. S.*, 207 U. S. 120, *Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122. Nevertheless, everyone must agree that the question is no more than one of interpretation, for in the cases at bar Congress certainly might, if it chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

*Grogan v. Walker*, *supra*, and *Anchor Line v. Aldridge*, *supra*, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thorough-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the Amendment, and its very want of particularity is a good index that it meant to cover what it could. For this

40 reason it is to be distinguished from earlier local acts of the same kind, as for example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful, since in form it only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the policy,

and not the promise, of the nation. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

41 However, the motives for positively assuming that such stores must be considered as included within Section three appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legislative motives is speculative, but that vice, if it be one, is of the plaintiffs' making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitations on that meaning, because of the supposed intent of Congress. Since, therefore, I am asked to have recourse to implications, I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises.

In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan v. Walker*, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the laws runs for all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of the  
42 stocks are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States

as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question; it must be enough for him that each is forbidden.

43

It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the section covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crews' rations stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later.

Cases like *Brown v. Duchesne*, *supra*, *Taylor v. U. S.*, *supra*, and *Scharrenberg v. U. S.*, *supra*, are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning of Section three accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is *sui generis*, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

44 It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages. It is true that the prayers for relief do include so much, but prayers

without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs than anything I may think about the law. The power under  
45 the Seventy-fourth Rule to grant such an order is undoubted, notwithstanding a dismissal of the bill, *Merrimac River Savings Bank v. City of Clay Center*, 219 U. S. 527, *Staffords v. King*, 90 Fed. R. 136 (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he holds his decree. Like all such matters, it depends upon a balance between the two, and I must now assume that the chances of success or not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some nicety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far as the loss of the liquors themselves is concerned the damage cannot be said to be irreparable. These must be condemned before they can be forfeited, and in the present state of the calendars the cases at bar will be finally determined long before such libels can be tried. If I am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the long acquiescence of the authorities in the practices here in question will moderate the ultimate penalty of  
46 confiscation; I must assume that the plaintiffs will receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as part of the crews' ration. If the ration is cut off, some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages to stay the enforcement of the law against stocks of wine and liquor necessary

for crews' rations, if honestly kept and dispensed for that purpose alone.

As to the maintenance of passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing inter se and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is easy to say, if one does not take seriously the opinion behind the Amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself

an irreparable injury which no judge has the right to ignore.  
47 The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is.

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge, the plaintiffs have no case. Therefore I will go no further than to issue an injunction against interfering with the carriage of a stock necessary for the crews' rations on the east-bound voyage. The plaintiffs must each give a bond in the sum of twenty-five thousand dollars, conditional against the use of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal if the same be taken at once. Settle orders on notice.

LEARNED HAND,  
D. J.

October 23, 1922.

At a Stated Term of the District Court of the United States, for the Southern District of New York, Held in the Court Rooms Thereof at the Post Office Building, in the Borough of Manhattan, City of New York, on the 25th Day of October, 1922.

Present: Hon. Learned Hand, District Judge.

UNITED STEAMSHIP COMPANY OF COPENHAGEN (Scandinavian American Line), Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Final Decree.*

October 25, 1922.

This cause came on to be heard at this term upon motions by the defendants to dismiss the bill of complaint and by the complainant for a final decree in its favor on the pleadings, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the bill of complaint herein be dismissed and defendants have judgment against the complainant for their costs to be taxed, and it is further

Ordered, adjudged and decreed that until final hearing of this cause in the Supreme Court of the United States and the entry of an order or decree on the mandate of that Court, the defendants, their servants, agents and subordinates, be and they hereby are stayed and restrained from seizing or interfering with the possession or carriage by complainant herein of a stock of liquors customary for the rations of the crews of complainant's vessels upon each eastbound voyage, upon the filing of a bond in the penal sum of twenty-five thousand dollars (\$25,000.), conditioned against the gift, issuance or sale of such stock of liquors by complainant otherwise than as crews' rations to the crews of complainant's vessels; and it is further

Ordered, adjudged and decreed that if complainant shall fail to make an appeal herein to the Supreme Court of the United States within five days from the entry hereof, or to move for preference on the first motion day of the Supreme Court, the defendants may move herein to vacate the injunction granted above.

LEARNED HAND,  
U. S. D. J.

[Endorsed:] District Court of the United States, Southern District of New York. United Steamship Company of Copenhagen (Scandinavian American Line), Complainant, against An-



drew W. Mellon, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants. Copy, Final Decree. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

52 In the United States District Court for the Southern District of New York.

UNITED STEAMSHIP COMPANY OF COPENHAGEN (Scandinavia American Line), Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Assignment of Errors.*

The complainant hereby assigns error in the final judgment or decree of the District Court herein entered October 25, 1922, in the following respects:

First. The Court erred in dismissing the bill of complaint herein.

Second. The Court erred in denying the petition for an injunction.

Third. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States prohibits a foreign ship from keeping on board while on the territorial waters of the United States intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fourth. The Court erred in holding that the National Prohibition Act prohibits a foreign ship from keeping on board, while on the territorial waters of the United States, intoxicating beverages  
53 constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the crew as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is tra-

ing when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Sixth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the passengers as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Seventh. That the National Prohibition Act as construed and applied by the District Court is unconstitutional and void because enforcement thereof with respect to sea stores on the complainant's vessels would deprive the complainant of its property and subject it to penalties without due process of law.

Eighth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the third and fourth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Ninth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the fifth and sixth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Tenth. The Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverages in the circumstances mentioned in the third, fourth, fifth and sixth assignments of error is prohibited by the Eighteenth Amendment and the National Prohibition Act.

Eleventh. The Court erred in refusing to hold that the interpretation of the National Prohibition Act mentioned in the ninth assignment of error was unconstitutional and invalid and not within the powers conferred by Congress by the Constitution.

Wherefore complainant-appellant prays that said decree or judgment of the United States District Court for the Southern District of New York be reversed and an injunction granted the complainant as prayed for in the bill of complaint herein, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

55 & 56 [Endorsed:] E. 25-32. District Court of the United States, Southern District of New York. United Steamship Company of Copenhagen (Scandinavian American Line), Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants. Copy. Assignment of Errors. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

57 & 58 In the United States District Court for the Southern District of New York.

UNITED STEAMSHIP COMPANY OF COPENHAGEN (Scandinavian American Line), Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Petition for Appeal and Allowance.*

The complainant above named, United Steamship Company of Copenhagen (Scandinavian American Line), conceiving itself aggrieved by the final judgment and decree entered herein October 25, 1922, does hereby appeal from said final judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, from which it appears that this cause is appealable directly from this court to the said Supreme Court under Section 238 of the Judicial Code, and said United Steamship Company of Copenhagen (Scandinavian American Line) prays that it be allowed this appeal and that a transcript of the record papers and proceedings upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

The foregoing appeal is hereby allowed as prayed for.

LEARNED HAND,  
U. S. D. J.,

To—

Hon. William Hayward,  
United States Attorney.

Alexander Gilchrist, Jr., Esq., Clerk,  
United States District Court,  
Southern District of New York.

59 [Endorsed:] District Court of the United States, Southern  
District of New York. United Steamship Company of Copen-  
hagen (Scandinavian American Line), Complainant, against An-  
drew W. Mellon, Secretary of the Treasury of the United States, et al.,  
Defendants. Copy. Petition for Appeal. Burlingham, Veeder,  
Masten & Fearey, Solicitors for Complainant, 27 William Street,  
Borough of Manhattan, New York City.

60 *Citation on Appeal.*

By the Honorable Learned Hand, One of the United States District  
Judges for the Southern District of New York, in the Second  
Circuit.

To Andrew W. Mellon, Secretary of the Treasury of the United  
States, Henry C. Stuart, Acting Collector of the Customs for the  
Port of New York, and John D. Appleby, Chief Zone Officer,  
Greeting:

You are hereby cited and admonished to be and appear before the  
United States Supreme Court to be holden at Washington in the  
District of Columbia on the 20th day of November 1922, pursuant to  
an appeal filed in the Clerk's Office of the District Court of the  
United States for the Southern District of New York, wherein United  
Steamship Company of Copenhagen (Scandinavian American Line)  
is complainant and you are defendants to show cause, if any there be,  
why the decree in said cause mentioned should not be corrected and  
why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City  
of New York, in the District and Circuit above named, this 25th  
day of October, in the year of our Lord One Thousand Nine Hun-  
dred and twenty-two, and of the Independence of the United States  
the One Hundred and Forty-seventh.

LEARNED HAND,  
United States — Judge for the Southern  
District of New York, in the Second Circuit.

[Endorsed:] E. 25-32. United States District Court, Southern District of New York. United Steamship Company of Copenhagen (Scandinavian American Line), Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States et al., Defendants. Citation. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, City of New York.

61 In the District Court of the United States for the Southern District of New York.

UNITED STEAMSHIP COMPANY OF COPENHAGEN (Scandinavian American Line), Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States,  
Henry C. Stuart Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

*Stipulation.*

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of said District Court in the above entitled matter as agreed on by the parties.

Dated: New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

WILLIAM HAYWARD,

*U. S. Attorney, Attorney for Defendants.*

62 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

UNITED STEAMSHIP COMPANY OF COPENHAGEN (Scandinavian American Line), Complainant,

vs.

ANDREW W. MELLON, Secretary of the Treasury of the United States,  
Henry C. Stuart Acting Collector of the Customs for the Port of New York, and John D. Appleby, Chief Zone Officer, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 25th day of October in the year of our Lord one thousand nine hundred and twenty two and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX GILCHRIST, JR.,  
*Clerk.*

Endorsed on cover: File No. 29,219. S. New York D. C. U. S. Term No. 669. United Steamship Company of Copenhagen (Scandinavian American Line), appellant, vs. Andrew W. Mellon, Secretary of the Treasury of the United States, et al. Filed October 27th, 1922. File No. 29,219.

(7605)

# **TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1922.**

**No. 670.**

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**THE PACIFIC STEAM NAVIGATION COMPANY, APPELLANT,**

**vs.**

**ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, ET AL.**

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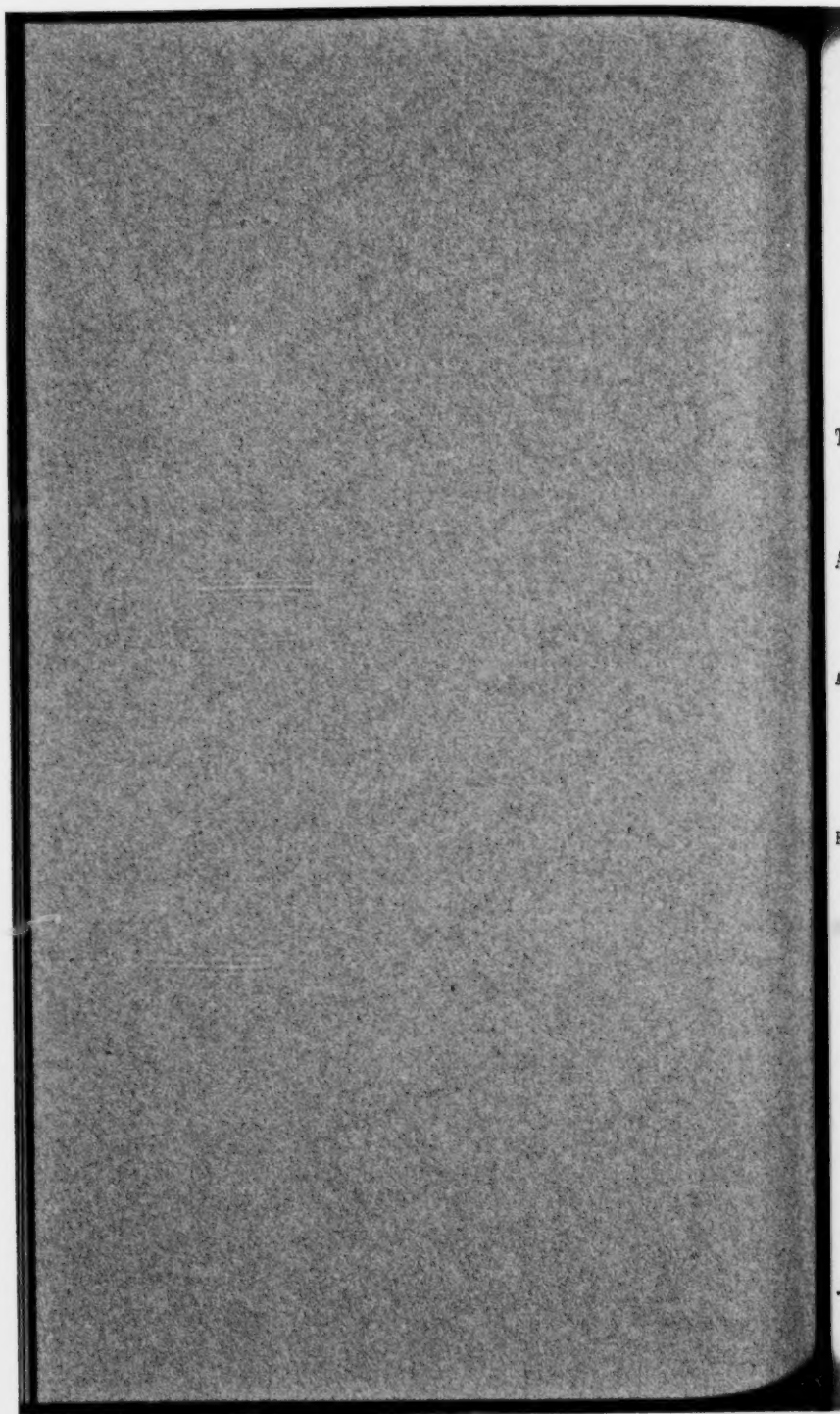
**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.**

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**FILED OCTOBER 27, 1922.**

**(29,220)**





(29,220)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 670.

THE PACIFIC STEAM NAVIGATION COMPANY, APPELLANT,

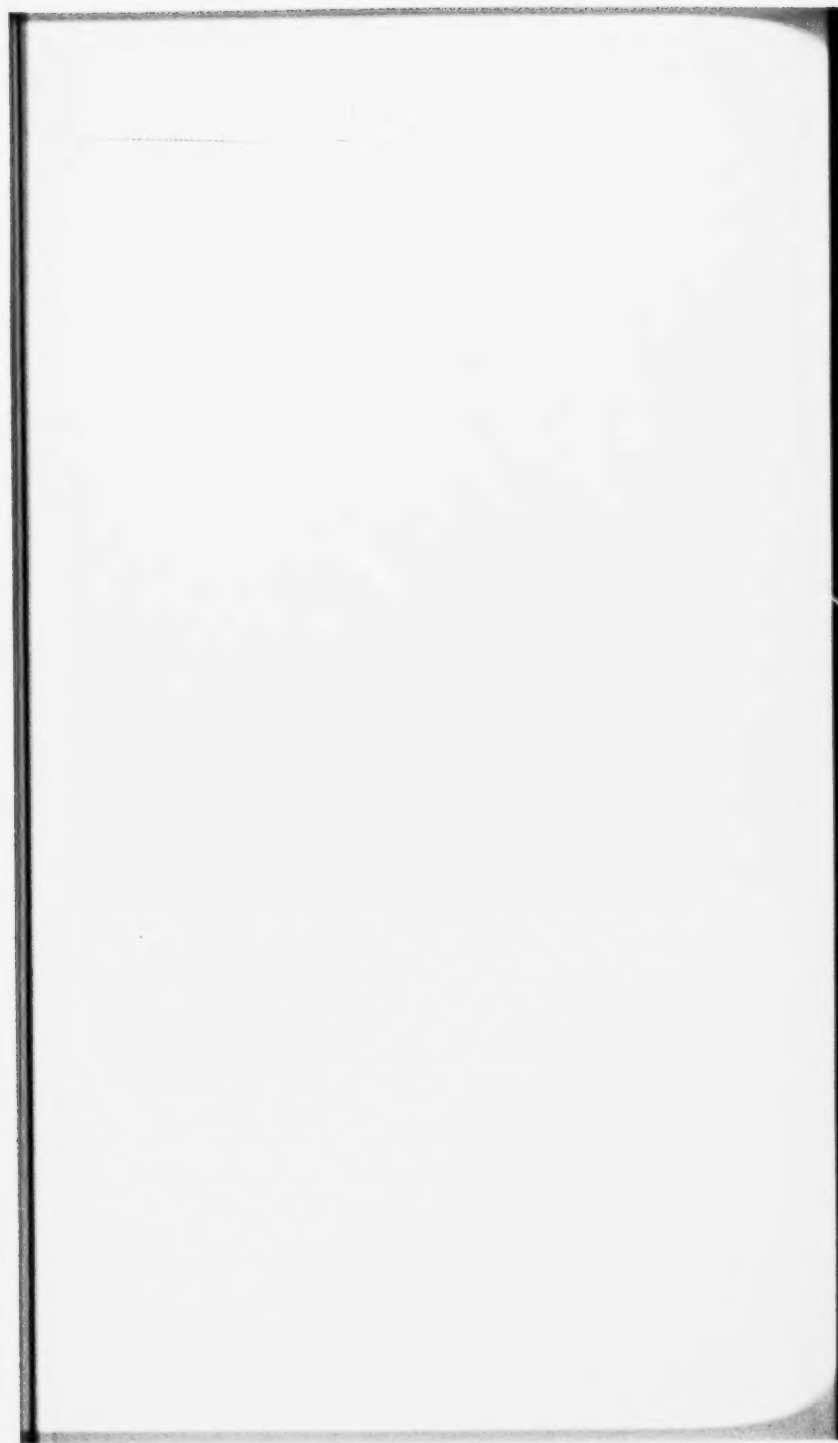
*vs.*

ANDREW W. MELLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1

*Equity Subpœna.*

The President of the United States of America to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by The Pacific Steam Navigation Company, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you, of Two Hundred and Fifty Dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 18th day of October, in the year One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

ALEX. GILCHRIST, JR.,  
*Clerk.*

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
*Complainant's Sol'rs.*

The defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX. GILCHRIST, JR.,  
*Clerk.*

2 In the District Court of the United States for the Southern District of New York.

In Equity.

THE PACIFIC STEAM NAVIGATION COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, Defendants.

*Bill of Complaint.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainant, The Pacific Steam Navigation Company, brings this its bill of complaint against the above named defendants, and respectfully shows as follows:

I. Complainant, The Pacific Steam Navigation Company, is a corporation duly organized and existing under the laws of Great Britain and Ireland, with its principal place of business in Liverpool, England.

II. Complainant is informed and verily believes and therefore alleges on information and belief:

The defendant Andrew W. Mellon is Secretary of the Treasury of the United States, and he is, and his subordinates are, by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of the United States and the making of Regulations promulgated for the purpose of enforcing such Acts of Congress.

The defendant Henry C. Stuart is a subordinate of said Secretary of the Treasury, and is Acting Collector of Customs for the port of New York, and said defendant is by law charged with the  
3 duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury, which from time to time may be promulgated within that portion of the port of New York wherein the complainant desires to bring its vessels equipped with certain sea stores as hereinafter set forth.

The defendant Ralph A. Day is a subordinate of the said Secretary of the Treasury and is the Prohibition Director for the State of New York, which state embraces that portion of the port of New York wherein the complainant desires to bring its vessels equipped as afore-said, and said defendant is by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed

under authority of the Eighteenth Amendment to the Constitution of the United States and regulations of executive departments of the United States Government promulgated for the enforcement of such Acts of Congress.

III. This is a suit of a civil nature arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three thousand dollars (\$3,000) in value, exclusive of interest and costs.

IV. Complainant is a foreign corporation organized under the laws of Great Britain and Ireland for the purpose of carrying on the steamship business and for very many years has been engaged in the business of transporting as common carrier, passengers and cargo for hire upon *upon* the high seas and in transacting such business the complainant maintains and operates fleets of steamships in overseas trade between ports of the United States and ports in the West Indies, Panama Canal Zone, West Coast of South and Central America and England.

4 All of the complainant's steamships are British vessels flying the British flag. Complainant owns twenty passenger ships of a total gross tonnage of 115,000 tons and 15 freight ships of a total gross tonnage of 55,000 tons. Of these, two passenger steamers of a total gross tonnage of 17,000 tons trade regularly between New York, Havana and the Canal Zone and ports on the west coast of South and Central America; and 15 vessels of a gross tonnage of 90,000 tons are engaged regularly in service between ports on the west coast of South and Central America, the Canal Zone, ports in the West Indies and ports in England, calling regularly at ports in the United States and Porto Rico. Three freight steamers are regularly engaged in trade between ports of the United States and ports on the west coast of South and Central America via the Panama Canal and five freight steamers are regularly engaged in the trade between ports on the west coast of South and Central America and ports in the Canal Zone and West Indies and England, regularly calling at ports in the United States. Said steamers are worth many millions of dollars and any interruption of their regular services would cause great loss and damage to the complainant, the extent of which is impossible to estimate. Regular passenger and freight service is maintained between New York and Havana, the Canal Zone and ports on the west coast of South and Central America, and regular freight and passenger service is maintained between said ports on the west coast of South and Central America and ports in the West Indies and England, the vessels engaged in such service being required to call at ports in the United States or Porto Rico for coaling. Complainant's principal office in the United States is located in the City of New York, and it occupies piers in the port and City of New York. It also has office and pier accommodations in a number of other ports in the United States, including the Canal Zone.

V. The crews operating complainant's vessels, including those carrying passengers and cargo and those carrying cargo alone, are

made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic liquors for beverage purposes is not prohibited and by whose customs the use of alcoholic liquors for beverage purposes is so widespread that complainant believes it would experience the greatest difficulty in obtaining adequate crews to operate their vessels running to the United States if they were prohibited from furnishing a usual and reasonable amount of liquor to members of the crews.

VI. By local regulations, enforced as to British vessels they are required to have on board a certain amount of liquor for medicinal and emergency use.

A considerable portion of passengers traveling to and from the United States by complainant's ships consist of through passengers from one foreign country to another, by way of the United States. As those passengers are largely foreigners, accustomed to the use of wines and liquors with their meals, if complainant is prevented from furnishing wines and liquors to them while on the high seas, it is believed they will travel by other lines not touching United States ports.

VII. The prohibition of the use of alcoholic liquors on complainant's vessels as sea stores, for the reasonable use of crew and passengers, it is believed, would cause your complainant great pecuniary loss by reason of the difficulty of obtaining crews, and would cause an annual loss of receipts from passenger business of many  
 6 thousand dollars a year, and will involve irreparable damage to your complainant, in that it will destroy a considerable part of its business and render a considerable part of its equipment useless and cause a loss of its profits.

VIII. It has at all times heretofore been the practice of complainant's vessels, in common with other British vessels, to carry as part of their sea stores certain wines, liquors and other intoxicating beverages for consumption by the vessel's passengers and crew, such as sea stores, including such wines, liquors and other intoxicating beverages, being the property of the complainant and on board solely for such consumption on board and not for transportation or landing in the United States or elsewhere, and upon arrival of any vessel in the United States an accurate list of all such sea stores, including such wines, liquors and other intoxicating beverages, being furnished to the United States authorities.

None of the intoxicating liquors so kept as sea stores for reasonable use of passengers and crew have been manufactured, sold or transported within, imported into, or exported from the United States or any territory subject to the jurisdiction of the United States. All wines and other intoxicating liquors kept as sea stores on complainant's vessels as aforesaid have been legally acquired.

Since the adoption of the so-called National Prohibition Act of October 28, 1919, complainant's ships have been permitted freely to come and go in the port of New York and other ports and territorial waters of the United States with such sea stores, including



such wines, liquors and other intoxicating beverages, on board, under regulations of the Secretary of the Treasury hereto annexed and marked Schedules A and B and reference thereto be prayed.

In reliance upon and under the authority of the above mentioned Treasury Decision and the Regulations promulgated in connection therewith and the procedure always followed as above described, complainants in good faith purchased in foreign ports and now have on board their vessels on the high seas bound for the United States, as sea stores, quantities of intoxicating liquor of a value in excess of three thousand dollars (\$3,000.00). The complainant has at all times been ready and willing to conform to, and has conformed to, such regulations, and upon arrival of any of complainant's vessels within the jurisdiction of the United States such vessel has immediately been boarded by the United States customs officials, who thereupon placed such wines, liquors and other intoxicating beverages under seal and assumed exclusive control thereof until the same were unsealed by such customs officials upon the vessel's again leaving the jurisdiction of the United States.

IX. All of the alcoholic liquors carried as such sea stores on complainant's vessels are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for sea stores is taken on board complainant's vessels at foreign ports, and no part of such liquors is intended to be landed in the United States.

X. On or about October 5, 1922, as complainant is informed and believes, the Attorney General of the United States transmitted an opinion to the Secretary of the Treasury in which, among other things, he stated that the sale, transportation or possession of intoxicating liquors for beverage purposes on foreign vessels while in territorial waters of the United States is prohibited by said National Prohibition Act. Thereafter the President of the United States directed that said National Prohibition Act be enforced in accordance with said opinion of the Attorney General, and directed the Secretary of the Treasury to proceed to the formulation of regulations for the enforcement of said law in accordance with said opinion of the Attorney General with respect to foreign ships.

Complainant is informed and believes that the defendant the Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States and threaten to enforce said Prohibition Act as so interpreted by the Attorney General. By order of the President of the United States, as complainant is informed and believes, the said regulations will not apply to foreign vessels sailing for the United States on or before October 14. The complainant's passenger steamer Essequibo however, sails from Havana, for the United States on October 22, and others of complainant's vessels are shortly from time to time thereafter *be* sailing from

foreign ports for the United States, and, unless restrained, the defendants intend, as complainant is informed and believes, upon arrival of said vessels within the United States, to seize all wines, liquors or other intoxicating beverages on board and included in the sea stores of said vessels, and threaten also to seize the vessels themselves as being in violation of said National Prohibition Act and subject to the penalties therein provided; and any such seizure of said wines, liquors or other intoxicating beverages constituting part of said sea stores of said vessels for use and consumption of passengers and crews as aforesaid, or seizure of said vessels themselves, will disrupt the sailings of complainant's vessels, prevent the performance of obligations incurred in respect thereof, deprive the complainant of a large volume of patronage, and otherwise cause loss, damage and difficulties to the complainant, to its great and irreparable loss and injury; and will deprive complainant of its property without due process of law.

XI. Complainant is advised by counsel, and verily believes, that the aforesaid ruling by the Attorney General in respect to foreign ships carrying intoxicating beverage liquors as ship's stores for crew or passengers as aforesaid, and any regulations formulated by the Secretary of the Treasury for the enforcement of such ruling, are and will be unauthorized and void because neither the  
9 Eighteenth Amendment nor the National Prohibition Act prohibits the carriage of such liquors as such sea stores for crew and passengers as aforesaid, and an interference with the carriage of such sea stores would, therefore, violate complainant's rights under the law and under existing treaties between the United States and Great Britain and otherwise; and would deprive complainants of their property without due process of law.

XII. Complainant is advised by counsel, and verily believes, that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders said Act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional.

XIII. Complainant alleges that the defendant, Andrew W. Mellon, or his subordinates, are preparing regulations, and that pursuant to said opinion of the Attorney General or such regulations, the defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart and Ralph A. Day, are threatening, notwithstanding the fact that the Interpretation of the Act of Congress, known as the National Prohibition Act, by the Attorney General is erroneous, unauthorized and void and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said National

Prohibition Act, if it purports to prohibit the carriage of said alcoholic beverages as sea stores for crew and passengers, is unconstitutional and void for the reasons hereinabove stated, to seize said alcoholic liquors now constituting sea stores on complainant's vessels, and to enforce against the complainant, its officers, agents and servants, various pains and penalties, including fines and imprisonment and various forfeitures of property provided by the Acts of Congress and regulations, and thus involve the complainant, its officers, agents and servants, in numerous suits and by such threats to prevent complainant, its employees and servants, from carrying out its contracts, and thus deprive the complainant of its business and of its property without due process of law; all to the irreparable damage of complainant, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainant would be involved in numerous suits if it were forced to bring an action at law to relieve its employees and property from such penalty and forfeiture.

Forasmuch, therefore, as complainant is without remedy in the premises, except in a court of equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled, it respectfully prays that the above named defendants and each of them be directed to make a full, true and perfect answer to this bill of complaint but not under oath, an answer under oath being expressly waived, and that said defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainant, its officers, servants and employees, or any of them, or complainant's steamships, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General, and from arresting and prosecuting the complainant, its officers, agents, servants or employees, or any of them, and from refusing to issue to the complainant and/or its steamers permits for clearance from the port of New York, or in any way interfering with the arrival or departure of the complainant's steamers, for or on account of any alleged violation by them, or any of them, or on account of any alleged violation by them, or any of them, of the Eighteenth Amendment or the National Prohibition Act, on the ground or claim that the carriage or possession of said intoxicating liquors as aforesaid as sea stores for crew and passengers is contrary to law; or from molesting or otherwise interfering with the complainant in the peaceful possession of said intoxicating liquors on board such vessels as part of their sea stores.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause whereby the defendants, their agents, servants, subordinates and employees, and each and every one of them be enjoined and restrained as hertofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainant further prays that a writ of subpoena be issued herein, directed to said defendants, commanding them on a day set, to appear and answer the bill of complaint herein.

THE PACIFIC STEAM NAVIGATION  
COMPANY,  
By SANDERSON & SON, INCORPORATED,  
*Agents,*  
By E. HARVEY HUNTER,  
*Treasurer.*

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,  
*Solicitors for Complainant.*  
27 William Street, New York City.

12

## SCHEDULE A.

(Copy.)

(T. D. 38218.)

Sea Stores—Liquors.

Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 106 and 107 of the Customs Regulations of 1915 as amended.

Treasury Department, December 11, 1919.

To Collectors of Customs and Others Concerned:

All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and keys sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes.

Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same Line or owner.

Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(Signed)

JOUETT SHOUSE,  
*Assistant Secretary.*

(99623.)

13

## SCHEDULE B.

(Copy.)

(T. D. 38248.)

## Sea Stores—Liquors.

Opinion of the Attorney General with respect to the practice under T. D. 38218 of sealing liquors listed as sea stores on vessels while in ports of the United States. Distinction made between American and foreign vessels. T. D. 38218 amended.

Treasury Department, January 27, 1920.

To collectors of customs and other- concerned:

Attention is invited to the appended copy of an opinion rendered the Department by the Attorney-General with respect to the Practice under T. D. 38218 of sealing liquors carried as sea stores on all vessels while in the ports of the United States, as indicated by the questions submitted to him.

Following the opinion of the Attorney-General the first paragraph of T. D. 38218 is hereby amended to read as follows:

All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on foreign vessels should be sealed on arrival of the vessel in port, and such portions thereof released from time to time for use by the officers and crew.

The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification. (108377.)

JOUETT SHOUSE,  
*Assistant Secretary.*

14 & 15 STATE OF NEW YORK,  
*County of New York, ss:*

E. Harvey Hunter being duly sworn, says: I am the treasurer of Sanderson & Son, Inc., agents in New York for The Pacific Steam Navigation Company, the complainant herein. I have read the foregoing bill of complaint and know the contents thereof and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and the grounds of my belief as to all matters in said bill of complaint not stated to be on my knowledge are an examination of documents and other papers in my possession

relating to the subject matter of this suit. The reason why this verification is not made by the complainant is that it is a foreign corporation.

E. HARVEY HUNTER.

Sworn to before me this 16th day of October, 1922.

[SEAL.]

FREDERICK W. MILLER,

*Notary Public, Queens County No. 1175.*

Certificate filed in New York County No. 362.

Term expires March 30, 1924.

16 [Endorsed:] E 25-30. District Court of the United States, Southern District of New York. The Pacific Steam Navigation Company, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Copy. Bill of Complaint. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

17 & 18 U. S. District Court, Southern District of New York.

E 25/30.

THE PACIFIC STEAM NAVIGATION COMPANY, Complainant,  
versus

ANDREW W. MELLON, Secretary of the Treas. of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for  
the State of New York, Defendants.

*Notice of Appearance and Demand.*

You will please take notice that I am retained by, and appear as attorney for, the Defendants in this action, and demand service of a copy of the complaint and all papers in this action upon me, at my office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours,

WILLIAM HAYWARD,  
*United States Attorney,  
Attorney for Defendant.*

New York, October 20, 1922.

To Messrs. Burlingham, Veeder, Masten & Feary,  
#27 William St.,  
Attorney for Plaintiff.

19 [Endorsed:] E 25-30. U. S. District Court, Southern District of New York. The Pacific Steam Navigation Company versus Andrew W. Mellon, et al. Notice of Appearance. William

Hayward, United States Attorney, Attorney for Defendant. Due service of a copy of the within Notice is hereby admitted. Dated the 20 day of Oct., 1922. ———, Plaintiff's Attorney. To Messrs. Burlingham, Veeder, Masten & Feary, 27 William Street, Plaintiff's Attorney-.

20 In the District Court of the United States for the Southern District of New York.

E. 25-30.

THE PACIFIC STEAM NAVIGATION COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Answer to Bill of Complaint.*

Now come the defendants herein and in answer to the bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the bill of complaint herein and divers parts thereof be dismissed, and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.
2. The Court has no jurisdiction to grant the relief prayed for or any part thereof.
3. The bill does not present a cause of action in equity under the Constitution of the United States.
4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.
5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.
6. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

Second. In answer to the allegations set out in paragraph seventh of the complaint the defendants allege on information and belief that any difficulty which complainant might experience in obtaining adequate crews from among the nationals of countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread would be readily obviated by the payment



of higher wages to said crews. Defendants are further informed and believe that many of the vessels of the American merchant marine carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages and that the said American vessels have never had the least difficulty in obtaining adequate crews from the nationals of such countries at the same wages paid to American crews.

Third. Defendants deny the allegations contained in paragraph eleventh of the bill of complaint that the ruling by the Attorney General referred to in said paragraph is and any regulations for the enforcement of such ruling are and will be unauthorized and void. Defendants further deny the allegation that such ruling and such regulations would violate complainant's rights under existing treaties between the United States, Great Britain and otherwise.

Fourth. Defendants deny the allegation contained in paragraph twelfth of the bill of complaint that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is correct, it renders said Act unconstitutional and void for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of

22 the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional. The defendants allege on the other hand that it is well within the powers of Congress delegated to it by the Eighteenth Amendment to the Constitution of the United States to declare the possession of intoxicating liquor to be unlawful and that such legislative declaration contained in the National Prohibition Act is a valid exercise of the legislative power and has a reasonable relation to the enforcement of the constitutional mandate.

For a separate and distinct defense herein, defendants allege:

Fifth. Defendants re-allege and re-affirm as part of this separate and distinct defense each and every allegation contained in paragraphs first to fourth above.

Sixth. Defendants are informed by their attorney and therefore allege that if the complainant is correct in its construction of the National Prohibition Act the implications involved are exceedingly serious and the claim of the complainant, if allowed, would carry with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States.

Seventh. Defendants are further informed and believe and therefore allege that for two years last past a large and profitable business has been carried on by divers persons with the object and result of importing liquor into this country contrary to law; that the vessels used by such persons are vessels under foreign registry and

23 such vessels sail from foreign ports with clearance papers showing that they are bound for other foreign ports. The actual destination of such vessels is not the port shown in their clearance papers but some point on the high seas near the coast of the United States from which its liquors are transferred to smaller boats which complete the smuggling and importation of the liquor into the United States. Up to the present time the vigilance of the customs officials in seizing such vessels when they came within the territorial limits of the United States has somewhat mitigated the evils of this traffic but if, as complainant contends it is only necessary to put liquors under lock and key to make such transportation legal and foreign vessels can sail our territorial waters at will with cargoes of liquor, the enforcement of the prohibition against the importation of liquors, already difficult, will become practically impossible.

Eighth. The rulings of the Secretary of the Treasury referred to in the bill of complaint have already been used as a cloak to hide smuggling operations and if the doctrine underlying such rulings is declared to be the law as claimed by complainant, defendants verily believe that its use as a cloak for such operations will greatly increase. As an instance of the use of such regulations to hide smuggling defendants allege that on or about January 15, 1920, the British passenger steamship "Harbinger" sailed from Halifax, N. S. for Havana, Cuba, carrying with her a large quantity of intoxicating liquors listed as sea stores. The said vessel came into the port of Portland, Maine, alleging a shortage of coal, and there her liquor was sealed under customs seals. Her Master protested her innocence and claimed the right as a foreign vessel to transport intoxicating liquors as sea stores under seal within the territorial waters of the United States. This right was accorded her under the Treasury rulings until recently in force and on which complainant has relied until now. Being under suspicion, however, the "Harbinger" was convoyed by the coastguard cutter "Ossipee" to Cape Ann whence she entered the port of Boston and thence proceeded without convoy to the neighborhood of New York where she was met by the coastguard cutter "Gresham" which convoyed her to New York. On January 26th, she was convoyed down New York Bay by the coastguard cutter "Manhattan" to Dunham Shipyard, Staten Island. There she remained under customs surveillance until February 6th when the customs seals on the liquors were broken by the crew and an attempt was made to import them into the United States. When such attempt was made the crew of said vessel were arrested. Two have pleaded guilty to a violation of the Prohibition Act and the vessel has been libelled to the Government. After the crew were arrested it became evident that the journey of this vessel down the coast of the United States was not, as alleged and as appeared, because of insufficient coal-carrying space but for the purpose of finding purchasers of the liquor carried as sea stores.

Ninth. Defendants further allege that under the regulations of the Secretary of the Treasury referred to in the complaint herein, customs officers have made no physical inventory of the stores of liquors on any foreign ships either upon their arrival in the ports of the United States or upon their leaving such ports. Permission has been given to remove certain of the liquors under seal for the purposes of rations given to the crews, but no record is kept of the amount of liquor which actually leaves United States ports  
25 on foreign vessels, nor is any inventory returned by such foreign vessels of the amount of liquors actually found when seals are broken by the ship's agents after leaving port.

Tenth. Defendants are informed and verily believe that the complainant makes large profits from the sale of intoxicating liquors on the high seas, such profits amounting to many thousand dollars per annum and further allege that loss of such profit is the only definitely ascertainable loss which the complainant will suffer if the National Prohibition Act as interpreted by the ruling of the Attorney General is given full force and effect.

Eleventh. Defendants further allege on information and belief that the sale of intoxicating liquors on the high seas by vessels carrying the American flag ceased with the issuance of the ruling of the Attorney General and is not now carried on. And defendants verily believe that if vessels of foreign registry are by the injunction of this Court facilitated in the sale of liquor on the high seas by being allowed to transport liquor within the territorial waters of the United States, the resultant damage to the American merchant marine will be great and irreparable. Not only will ships of the American merchant marine suffer the loss of revenue which they have hitherto enjoyed from the sale of intoxicating liquors on the high seas and which ships of foreign nations will continue to enjoy if the prayer of the complainant herein is granted, but defendants believe that a large number of passengers who would otherwise travel on American ships and who would travel on American ships if both American ships and foreign ships were placed in the same position in regard to the sale of liquor on the high seas, will, if

26 foreign ships are placed in an advantageous position in this regard travel on foreign ships and the American ships will lose a large amount of revenue thereby. Defendants are informed and verily believe that the loss of such revenue from the sales of liquor and from passage money in case of a differential treatment giving preference to foreign ships over American ships in the matter of transportation of intoxicating liquors within the territorial waters of the United States, will be sufficient to make it impossible for the American merchant marine to compete profitably with ships of foreign registry. The majority of the American passenger liners operating in the North Atlantic trade, in competition with complainant's and other foreign vessels are owned and operated directly by the United States Government. Any loss of revenue by reason of a differential treatment favorable to foreign ships will fall directly on the United States Government and its taxpayers.

Wherefore, defendants pray that the bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,  
*United States Attorney for the  
 Southern District of New York,  
 Attorney for Defendants.*

Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

27 United States District Court, Southern District of New York.

PACIFIC STEAM NAVIGATION COMPANY, Complainant,  
 against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Stipulation.*

The above entitled suit having been duly brought on for trial by consent of the parties, at a Stated Term of the United States District Court for the Southern District of New York, before the Honorable Learned Hand, District Judge, and a motion for a judgment on the pleadings having been made by the complainant, and the Court having heretofore, at a Stated Term thereof, held at the United States Post Office Building in the City of New York on the 17th day of October, 1922, before the Honorable Learned Hand, heard extended argument of counsel upon a similar motion in like suits by the Oceanic Steam Navigation Company, Ltd., and other complainants, involving similar questions;

It is stipulated that the said motion for judgment in the above entitled suit be, and the same hereby is, forthwith submitted without further argument for consideration and decision by the  
 28 Court, along with said suits of the Oceanic Steam Navigation Company, Ltd., and other complainants.

Dated, New York, October 19th, 1922.

BURLINGHAM, VEEDER, MASTEN &  
 FEAREY. *Solicitors for Complainant.*  
 WILLIAM HAYWARD,  
*United States Attorney for the South-  
 ern District of New York, Solicitor  
 for Defendants.*

29 & 30 [Endorsed:] E. 25-30. District Court of the United States, Southern District of New York. Pacific Steam Navigation Company, Complainant, against Andrew W. Mellon, Sec-

retary of the Treasury of the United States, et al., Defendants. Copy. Stipulation. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

31 In the District Court of the United States for the Southern District of New York.

PACIFIC STEAM NAVIGATION COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Restraining Order.*

A motion having been made in the above entitled case for judgment on the pleadings, and by agreement between the parties submitted to the Court for determination, along with a similar motion made in the suit of The Oceanic Steam Navigation Company, Limited, against Andrew W. Mellon and others, it is, on motion of Burlingham, Veeder, Masten & Fearey, Solicitors for the complainant.

Ordered that until the determination of said motion by entry of order thereon, the defendants, their successors, agents, servants and subordinates, and each of them, be, and hereby are, restrained from seizing, disturbing, removing or in any way interfering with wines, liquors or other intoxicating beverages on board complainant's ships as sea stores or medicines, as more particularly set forth in the said bill of complaint herein; from seizing, disturbing or in any way interfering with the complainant's ships by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages as ship's stores, as more particularly set forth in said bill of complaint, and from enforcing or attempting to enforce, or causing to be enforced against the complainant, its officers, agents or servants, or

any of them, or any of its steamships, any of the pains, penalties or forfeitures provided in and by the so-called National Prohibition Act enacted by Congress pursuant to the Eighteenth Amendment to the Federal Constitution; and from refusing to issue to complainant or its steamers, permits for clearance from the port of New York, or in any way interfering with the arrival or departure of any of the complainant's steamers, by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages, as said ship's stores, as more particularly set forth in the bill of complaint herein; and on like motion, it is further

Ordered that service of a copy of this order on the United States Attorney for the Southern District of New York shall be sufficient.

Dated, New York, October 21st, 1922.

LEARNED HAND,  
United States District Judge.

34 [Endorsed:] E. 25-30. District Court of the United States, Southern District of New York. Pacific Steam Navigation Company, Complainant, vs. Andrew W. Mellon and others, Defendants. Copy Restraining Order. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

SIR:

Take notice that the original of which the within is a copy, was this day duly filed herein in the office of the clerk of this Court. Dated, New York, October 21, 1922.

Yours, etc.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

27 William Street, Borough of Manhattan, New York City.

35 United States District Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE  
(HENDERSON BROTHERS), LTD.,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States, et al.

And Ten Other Cases.

*Opinion.*

Oct. 23, 1922.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decrees upon the answers. The pleadings have been so drawn on both sides as to raise the merits of the controversy, and it is not necessary to set them forth in detail.

The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and liquors as part of their sea-stores. This was done with the consent of the public authorities who promulgated regulations recognizing the practice, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an option at that time given by the Attorney General, was that, as part of the ship's stores, these wines and liquors, if sealed and kept on board, were not to be regarded as brought within the

country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where the peace of the sovereign is at stake. Later the permission so given was further extended to allow the ships to dispense to their crews their customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of *Grogan v. Walker*, and *Anchor Line v. Aldridge*, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration, on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying in and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed to execute the law in accordance with this opinion, and this created the situation out of which these bills arise.

The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in Europe so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal, and carried out again, only for the entertainment of passengers embarking from the United States. Besides the wines and liquors so used the steamers carry a stock for the use of their crews. In the case of the

French, Italian and Belgian ships the law of their flag requires them to supply a ration of wine and in those cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore, the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign lines; they have freely sold their wines and liquors at sea and brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some cases the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the Zone Officer, but the Collector of the Port of New York and the local Prohibition Director are defendants in all.

#### Appearances:

Hon. Van Vechten Veeder, for Oceanic Steam Navigation Co., Ltd., Liverpool, Brazil & River Plate Steam Navigation Co., Ltd., United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., The Netherlands American Steamship Co. (Holland America Line), and Pacific Steam Navigation Company.



Lucius H. Beers, Esq., for the Cunard Steamship Co., Ltd., and Anchor Line (Henderson Brothers).

Joseph P. Nolan, Esq., for Campagnie Generale Transatlantique.

Reid L. Carr, Esq., for United American Lines, et al.

Cleatus Keating, Esq. and John M. Woolsey, Esq., for International Mercantile Marine and International Navigation Co., Ltd.

William Hayward, Esq., United States Attorney.

And John Holley Clark, Esq., Assistant U. S. Attorney, for Defendants in all cases.

### 38 LEARNED HAND, D. J.:

It is conceded, and indeed could not be disputed, after *Grogan v. Walker and Anchor Line v. Aldridge*, decided May 15, 1922, that, had the liquors here in question been a part of the ships' cargo, the bills would not lie. It makes no difference that they were not to be broached while carried within territory of the United States; the carriage would be transportation none the less. But because they are part of the ships' stores, in the sense that that term is generally understood, the plaintiffs argue that they do not fall within the same rule. This argument rests upon two alternative premises, first, that "transportation" involves a place where, and a person to whom, the goods are to be delivered, and second, that a ship's stores have by long custom been treated as a part of the "furniture," *Brough v. Whitmore*, 4 Term R. 206, or "appurtenances," *The Dundee*, 1 Hagg. Adm. 109, of the ship, which do not without particular mention become subject to the municipal law of the ports into which she enters, any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I do not see how that would help the plaintiffs. These liquors are carried for delivery at sea to the passengers and crew, and when so delivered their transportation ends. There appears to me no significant distinction in the fact that the place of delivery is the ship itself. The passengers, and for that matter, the crew, are not the same person as the owner, and if the passage of title or possession has anything to do with the matter, the title to, and possession of, the bottle or the dram, passes when it is handed to its consumer. The carriage within the limits of the Port of New York is a part of a transit whose purpose from the beginning is that very delivery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to search out and coal at sea friendly cruisers during war, as happened in 1914.

Therefore, I might admit the plaintiffs' interpretation of the word, if it were necessary. Nevertheless, it seems to me at best very doubtful whether it carries with it any such limitation. The cases in which the plaintiffs rely come only to this, that the jurisdiction of the United States under the interstate commerce clause does not terminate until delivery after a transit across State lines, *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196, *Rhodes v. Iowa*, 170 U. S. 412, *Louisville & Nashville R. R. v. Cook Brewing Co.*, 223 U. S. 70, *Danciger v. Cooley*, 248 U. S. 319. From this it does not follow

that the term, "transportation," as used in this statute, implies delivery to another than the person who carries the liquors. Suppose, for example, a parcel of liquor, made after the Amendment, and carried off to be laid away in a cache. There can be no question, I believe, that two separate crimes would be committed, "manufacture" and "transportation."

Nor does it seem to me that the thirteenth and fourteenth sections of Title II of the Prohibition Act, help the plaintiffs. Under these, carriers are required to mark the consignor's and consignee's names on the outside of all packages. But it does not follow that a regulation like this of one kind of transportation imputes to the word itself any of the conditions which it enacts. In common use to transport means to carry about, and I see no reason why it should mean less in Section three. The law clearly intended by immobiliz-

40 ing liquor to make surreptitious traffic in it impossible and its policy would as well cover movements which might be incidental to, as those which immediately terminated in, a delivery to someone else. The case of *Street v. Lincoln Safe Deposit Company*, 254 U. S. 88, did not decide anything to the contrary; is turned upon the fact that the possession of the liquor in the leased room and in the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as *Street* had, for the possession of the liquor. I conclude therefore that the carriage in question is "transportation."

The first point being thus disposed of, I come to the second. It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States, (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they must be manifested and may not be excessive in quantity, as such they are not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbade generally the transportation of liquors, it must be read in the light of this statute and the long usage under it,

41 and that what is not within the United States for the purposes of customs ought not to be so for purposes of prohibition. In addition they urge that under the maritime law it is held that for most purposes sea-stores will be treated as a part of the ship herself. If she is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and least of all a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to these: *Brown v. Duchesne*, 19 How. 123, *Taylor v. U. S.*, 207 U. S. 120,

*Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122. Nevertheless, everyone must agree that the question is no more than one of interpretation, for in the cases at bar Congress certainly might, if it chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

*Grogan v. Walker*, *supra*, and *Anchor Line v. Aldridge*, *supra*, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thorough-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the Amendment, and its very want of particularity is a good index that it meant to cover what it could. For this

reason it is to be distinguished from earlier local acts of the same kind, as for example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful, since in form it only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the policy, and not the promise, of the nation. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

However, the motives for positively assuming that such stores must be considered as included within Section three appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legis-

lative motives is speculative, but that vice, if it be one, is of the plaintiffs' making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitations on that meaning, because of the supposed intent of Congress. Since, therefore, I am asked to have recourse to implications, I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises.

In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan v. Walker*, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the law runs for all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of the  
 44 stocks are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question; it must be enough for him that each is forbidden.

45 It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be

made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the section covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crews' rations stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later.

Cases like *Brown v. Duchesne*, *supra*, *Taylor v. U. S.*, *supra*, and *Scharrenberg v. U. S.*, *supra*, are all indeed in point. They illustrate the extent to which seamen and ships are regarded as en-  
46 claves from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning of Section three accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is *sui generis*, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages. It is true that the prayers for relief do include so much, but prayers without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs

than anything I may think about the law. The power under the Seventy-fourth Rule to grant such an order is undoubted, notwithstanding a dismissal of the bill, *Merriam River Savings Bank v. City of Clay Center*, 219 U. S. 527, *Staffords v. King*, 90 Fed. R. 136 (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he holds his decree. Like all such matters, it depends upon a balance between the two, and I must assume that the chances of success are not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some nicety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far as the loss of the liquors themselves is concerned the damage cannot be said to be irreparable. These must be condemned before they can be forfeited, and in the present state of the calendars the cases at bar will be finally determined long before such libels can be tried. If I am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the long acquiescence of the authorities in the practices here in question will moderate the ultimate penalty of confiscation; I must assume that the plaintiffs will receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as part of the crews' ration. If the ration is cut off, some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages to stay the enforcement of the law against stocks of wine and liquor necessary for crews' rations, if honestly kept and dispensed for that purpose alone.

As to the maintenance of passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing inter se and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is easy to say, if one does not take seriously the opinion behind the Amend-

ment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury which no judge has the right to ignore. 49 The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is.

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge, the plaintiffs have no case. Therefore I will go no further than to issue an injunction against interfering with the carriage of a stock necessary for the crews' rations on the east-bound voyage. The plaintiffs must each give a bond in the sum of twenty-five thousand dollars, conditional against the use of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal if the same be taken at once. Settle orders on notice.

LEARNED HAND,  
D. J.

October 23, 1922.

50 At a Stated Term of the District Court of the United States for the Southern District of New York, Held in the Court Rooms Thereof at the Post Office Building, in the Borough of Manhattan, City of New York, on the 25th Day of October, 1922.

Present: Hon. Learned Hand, District Judge.

THE PACIFIC STEAM NAVIGATION COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Final Decree.*

October 25, 1922.

This cause came on to be heard at this term upon motions by the defendants to dismiss the bill of complaint and by the complainant for a final decree in its favor on the pleadings, and was argued by counsel; and thereupon, upon consideration thereof, it was



Ordered, adjudged and decreed that the bill of complaint herein be dismissed and defendants have judgment against the complainant for their costs to be taxed, and it is further

Ordered, adjudged and decreed that until final hearing of this cause in the Supreme Court of the United States and the entry of an order or decree on the mandate of that Court, the defendants, their servants, agents and subordinates, be and they hereby are stayed and restrained from seizing or interfering with the possession 51 & 52 or carriage by complainant herein of a stock of liquors customary for the rations of the crews of complainant's vessels upon each eastbound voyage, upon the filing of a bond in the penal sum of twenty-five thousand dollars (\$25,000.), conditioned against the gift, issuance or sale of such stock of liquors by complainant otherwise than as crews' rations to the crews of complainant's vessels; and it is further

Ordered, adjudged and decreed that if complainant shall fail to take an appeal herein to the Supreme Court of the United States within five days from the entry hereof, or to move for preference on the first motion day of the Supreme Court, the defendants may move herein to vacate the injunction granted above.

LEARNED HAND,  
U. S. D. J.

53 [Endorsed:] E. 25-30. District Court of the United States, Southern District of New York. The Pacific Steam Navigation Company, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants. Final Decree. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

54 In the District Court of the United States for the Southern District of New York.

THE PACIFIC STEAM NAVIGATION COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

#### *Assignment of Errors.*

The complainant hereby assigns error in the final judgment and decree of the District Court herein entered October 25, 1922, in the following respects:

First. The Court erred in dismissing the bill of complaint herein

Second. The Court erred in denying the petition for an injunction.

Third. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States prohibits a foreign ship from keeping on board while on the territorial waters of the United States intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fourth. The Court erred in holding that the National Prohibition Act prohibits a foreign ship from keeping on board, while on the territorial waters of the United States, intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the crew as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Sixth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the passengers as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Seventh. That the National Prohibition Act as construed and applied by the District Court is unconstitutional and void because enforcement thereof with respect to sea stores on the complainant's vessels would deprive the complainant of its property and subject it to penalties without due process of law.

Eighth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the third and fourth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Ninth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are

on the territorial waters of the United States in the circumstances mentioned in the fifth and sixth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Tenth. The Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverages in the circumstances mentioned in the third, fourth, fifth and sixth assignments of error is prohibited by the Eighteenth Amendment and the National Prohibition Act.

Eleventh. The Court erred in refusing to hold that the interpretation of the National Prohibition Act mentioned in the ninth assignment of error was unconstitutional and invalid and not within the powers conferred by Congress by the Constitution.

Wherefore complainant-appellant prays that said decree or judgment of the United States District Court for the Southern District of New York be reversed and an injunction granted the complainant as prayed for in the bill of complaint herein, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, October 25, 1922..

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

58 [Endorsed:] E. 25-30. District Court of the United States, Southern District of New York. The Pacific Steam Navigation Company, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants. Copy. Assignments of Error. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

59 & 60 In the District Court of the United States for the Southern District of New York.

THE PACIFIC STEAM NAVIGATION COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Petition for Appeal and Allowance.*

The complainant above named, The Pacific Steam Navigation Company, conceiving itself aggrieved by the final judgment and decree entered herein October 25 1922, does hereby appeal from said

final judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, from which it appears that this cause is appealable directly from this court to the said Supreme Court under Section 238 of the Judicial Code, and said The Pacific Steam Navigation Company prays that it be allowed this appeal and that a transcript of the record papers and proceedings upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

Dated, New York, October 25, 1922.

The foregoing appeal is hereby allowed as prayed for.

LEARNED HAND,

*U. S. D. J.,*

To—

Hon. William Hayward,  
United States Attorney.

Alexander Gilchrist, Jr., Esq., Clerk,  
United States District Court,  
Southern District of New York.

61 [Endorsed:] District Court of the United States, Southern District of New York. The Pacific Steam Navigation Company, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States et al., Defendants. Copy. Petition for Appeal. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

62 *Citation on Appeal.*

By the Honorable Learned Hand, One of the United States District Judges for the Southern District of New York, in the Second Circuit.

To Andrew W. Mellon, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court to be holden at Washington in the District of Columbia on the 20th day of November 1922, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein The Pacific Steam Navigation Company is complainant and you are defendants to show cause, if any there be, why the decree in said

cause mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 25th day of October, in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

LEARNED HAND,  
*United States — Judge for the Southern  
District of New York, in the Second Circuit.*

[Endorsed:] E. 25-30. United States District Court, Southern District of New York. The Pacific Steam Navigation Company, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Citation. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, City of New York.

63 In the District Court of the United States for the Southern District of New York.

THE PACIFIC STEAM NAVIGATION COMPANY, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States,  
Henry C. Stuart Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for  
the State of New York, Defendants.

*Stipulation.*

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of said District Court in the above entitled matter as agreed on by the parties.

Dated: New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &  
FEAREY,

*Solicitors for Complainant.*

WM. HAYWARD,

*U. S. Atty., Attorney for Defendants.*

64 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

THE PACIFIC STEAM NAVIGATION COMPANY, Complainant,

vs.

ANDREW W. MELLON, Secretary of the Treasury of the United States,  
Henry C. Stuart Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for  
the State of New York, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United  
States of America for the Southern District of New York, do hereby  
Certify that the foregoing is a correct transcript of the record of the  
said District Court in the above-entitled matter as agreed on by the  
parties.

In testimony whereof, I have caused the seal of the said Court to  
be hereunto affixed, at the City of New York, in the Southern Dis-  
trict of New York, this 25th day of October in the year of our Lord  
one thousand nine hundred and twenty two and of the Independence  
of the said United States the one hundred and forty-seventh.

[Seal of District Court of the United States, Southern District  
of N. Y.]

ALEX GILCHRIST, JR.,  
*Clerk.*

Endorsed on cover: File No. 29,220. S. New York D. C. U. S.  
Term No. 670. The Pacific Steam Navigation Company, appellant,  
vs. Andrew W. Mellon, Secretary of the Treasury of the United  
States, et al. Filed October 27th, 1922. File No. 29,220.

(7606)

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

**No. 678.**

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NAVIGAZIONE GENERALE ITALIANA, APPELLANT,

*vs.*

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, *ET AL.*

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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FILED NOVEMBER 2, 1932.

**(29,228)**



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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

**No. 678.**

NAVIGAZIONE GENERALE ITALIANA, APPELLANT,

*vs.*

ANDREW W. MELLON, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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*Equity Subpœna.*

The President of the United States of America to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Navigazione Generale Italiana and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you & each of you of two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 23rd day of October in the year One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

GILBERT & GILBERT,  
*Plaintiff's Sol'rs.*

ALEX GILCHRIST, JR.,  
*Clerk.*

The Defendant- are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX GILCHRIST, JR.,  
*Clerk.*

2 In the District Court of the United States for the Southern District of New York.

In Equity.

NAVIGAZIONE GENERALE ITALIANA, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainant, Navigazione Generale Italiana, brings this its bill of complaint against the above-named defendants, and respectfully shows as follows:

I. Complainant, Navigazione Generale Italiana, is a corporation duly organized and existing under the laws of the Kingdom of Italy, with its principal place of business at Genoa, Italy.

II. Complainant is informed and verily believes and therefore alleges upon information and belief, that the defendant Andrew W. Mellon is Secretary of the Treasury of the United States, and he is and his subordinates are, by law, charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of

the United States and the making of Regulations promulgated for the purpose of enforcing such Acts of Congress.

The defendant, Henry C. Stuart, is a subordinate of said Secretary of the Treasury, and is Acting Collector of Customs for the Port of New York, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury which from time to time may be promulgated, within that portion of the Port of New York wherein the complainant desires to bring its vessels equipped with certain sea stores as hereinafter set forth.

The defendant Ralph A. Day is a subordinate of the said Secretary of the Treasury and is the Prohibition Director for the State of New York, which State embraces that portion of the Port of New York wherein the complainant desires to bring its vessels equipped as aforesaid, and said defendant is by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under authority of the Eighteenth Amendment to the Constitution of the United States and regulations of Executive departments of the United States Government promulgated for the enforcement of such Acts of Congress.

III. This is a suit of a civil nature, arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three thousand dollars (\$3,000) in value, exclusive of interest and costs.

IV. The complainant is a foreign corporation organized under the laws of the Kingdom of Italy, for the purpose of carrying on a trans-

Atlantic steamship business and for very many years has been engaged in the business of transporting as common carrier passengers and cargo for hire on the high seas and in transacting such business complainant maintains and operates fleets of steamships in over-seas trade between ports of the United States and ports in Italy and other ports.

All the complainant's vessels are Italian vessels flying the Italian flag and the passenger vessels are in fact all units of the Royal Italian Naval Reserve; being registered under the Italian flag the said vessels are subject to provisions of the Italian law, which requires the steamships to furnish to the crew and passengers certain liquors containing one-half of one per cent of more of alcohol by volume.

The Italian Emigration Code and the Ministerial Decree, of May 18, 1911, also provide that to every emigrant traveling to foreign

countries there must be given as food, among other things, one-half litre of Italian wine of 12 per cent alcoholic content, as per said Ministerial decree, and schedule of foods, hereto annexed and marked Exhibit C; and for the use of the hospital on the vessel the regulations prescribe that there must be on board for use in the ships' hospital on the basis of one thousand emigrants and for thirty days' voyage, ninety-five tins of consommé; twenty kilos of alimentary paste; 23 kilos of Semolina; fifty kilos of chickens; twenty-four bottles of Barola wine; five hundred lemons; one thousand eggs; twenty-four bottles of Marsala wine; twelve bottles of cognac made from wine; fifty litres of Pasteurized milk; and for children fifteen hundred litres of Pasteurized milk. The same Code, Article 170, requires ships bringing third-class passengers of Italian nationality to Italy from trans-oceanic ports to conform to the above regulations as regards food, sanitary conditions, etc.

The Italian laws applicable both in the original language and a translation thereof will be submitted to the Court upon the trial or other hearing herein.

The complainant owns 33 vessels, of a total gross tonnage of 236,856, of which 15 freight vessels of a total gross tonnage of 88,722 and 4 passenger steamer vessels of a total gross tonnage of 50,712, trade regularly between foreign ports and ports of the United States; the complainant's freight steamers call from time to time at ports of the United States in making voyages to and from those ports from and to the ports of foreign countries. Said steamers are worth many millions of dollars and any interruption of their regular service would cause great loss and damage to the complainant, the extent of which it is impossible to estimate. Complainant maintains regular passenger service between New York and ports of Italy.

Complainant's principal office in the United States is located in the City of New York where it occupies a pier in the Port and City of New York. Complainant has obligated itself with the City of New York under a lease of said pier for a term of years, having about five years to run, at a rental of over \$500,000, for which rental the complainant is responsible, and has incurred large expenditures in advertising, in printing tickets, circulars and other matter in connection with its trade with the United States, in furniture, fixtures, gang planks, and other similar articles useful only in connection with the docking of vessels here.

V. The Italian law requires that the crew operating complainant's vessels shall be made up entirely of subjects of Italy, and such crew is made up entirely of subjects of Italy, under the laws of which country the use of alcoholic liquors for beverage purposes is not prohibited, but on the contrary is required as above stated. According to the customs of Italy and other nations as well, including the United States up to the passage of the National Prohibition law, the use of alcoholic liquors for beverage purposes is so widespread that complainant believes even if the Italian law above stated would not be enforced that complainant would experience the greatest difficulty in obtaining adequate crews to operate their ves-

sels running to the United States if such vessels were prohibited from furnishing a usual and reasonable amount of liquor to the members of the crew.

VI. By local regulations in force as to Italian vessels they are, as above stated, required to have on board a certain amount of liquor for medicinal and emergency use.

Among passenger vessels regularly crossing the North Atlantic ocean are many which land at Canadian ports, and if your complainant is prohibited from furnishing its passengers with alcoholic beverages it believes a large number of passengers who would otherwise have patronized complainant's ships will patronize ships landing at Canadian ports.

A considerable portion of the passengers travelling to and from the United States by complainant's ships consists of through passengers from one foreign country to another by way of the United States. As these passengers are largely foreigners, accustomed to the use of wines and liquors with their meals, especially on sea journeys, if complainant is prevented from furnishing wines and liquors to them while on the high seas, it believes they will travel by steamers of other lines not touching at United States ports.

7 VII. The prohibition of the use of alcoholic liquors on complainant's vessels as sea stores for the reasonable use of the crew and passengers it is believed would cause your complainant great pecuniary loss by reason of the impossibility and difficulty of obtaining crews and clearance papers from ports in Italy, and would cause an annual loss of receipts from the passenger business of many thousands of dollars a year, and similarly would cause a loss of receipts on the freight business of many thousands of dollars a year, and would involve irreparable damage to your complainant in that it will destroy a considerable part of its business and render a considerable part of its equipment useless and cause a loss of its profits.

Vessels under the Italian flag including the vessels of the complainant have heretofore carried as part of their sea stores certain wines, liquors and other intoxicating beverages for consumption by the passengers and crew of such vessels, such sea stores including such wines, liquors and other intoxicating beverages being the property of the complainant and on board solely for such consumption on board and not for transportation to, from or in the United States or landing in the United States or elsewhere, and upon arrival of any vessel in the United States an accurate list of all such sea stores particularly of such wines, liquors and other intoxicating beverages is furnished to the United States authorities; none of the intoxicating  
liquors so kept as sea stores have been manufactured, sold or  
8 transported within, imported into or exported from the United States or any territory subject to the jurisdiction of the United States. All such wines and other liquors are kept on board the vessels of the complainant until consumed.

All of the intoxicating liquors so kept on the vessels of complainant while in ports of the United States or within the territorial waters of



the United States have been in all respects legally acquired and not in violation of any law or regulation of the United States.

VIII: Since the adoption of the so-called National Prohibition Act of October 28, 1919, complainant's vessels have been permitted freely to come and go in the Port of New York and other ports and territorial waters of the United States, having on board such sea stores including wines, liquors and other intoxicating beverages, under regulations of the Secretary of the Treasury, hereto annexed and marked Exhibits A and B, and incorporated herein by reference as if herein fully set forth; in reliance on which and the procedure always followed as above described, the complainant in good faith purchased in foreign ports and now has on board its vessels in Italy, on the high seas bound for the United States, as well as in the Port of New York, as sea stores, quantities of intoxicating liquors of a value in excess of three thousand dollars (\$3,000), and has at all times been ready and willing to conform to and has conformed to the aforesaid regulations and upon arrival of any of complainant's vessels within the jurisdiction of the United States such vessel has immediately been boarded by the United States Customs officials, who thereupon placed such wines, liquors and other intoxicating liquors under seal and assumed exclusive control thereof until the same were unsealed by such Customs officials on the vessel's again leaving the jurisdiction of the United States, and the complainant is and has at all times been ready and willing to conform to such other reasonable regulations as would prevent the landing or importation into the United States of any liquors kept on board said vessels.

IX. All of the alcoholic liquors carried as such sea stores on complainant's vessels are produced and manufactured and purchased in countries other than the United States or territories subject to its jurisdiction of the United States and are taken on board the complainant's vessels at foreign ports and no part thereof is intended to be landed in the United States.

X. Upon information and belief, on or about October 5, 1922, the Attorney General of the United States gave it as his opinion that the sale, transportation or possession of intoxicating liquors for beverage purposes on foreign vessels while in territorial waters of the United States is prohibited by the aforesaid National Prohibition Act. Thereupon the President of the United States directed that said National Prohibition Act be enforced in accordance with said opinion of the Attorney General, and directed the defendant, Secretary of the Treasury, to proceed to the formulation of regulations for the enforcement of said law in accordance with said opinion; in pursuance whereof the Secretary of the Treasury and his subordinates acting under his direction, are proceeding to formulate regulations to prevent the possession of all intoxicating liquors for beverage purposes as sea stores for crew and passengers by foreign vessels entering ports of the United States and are threatening to enforce said Prohibition Act as so interpreted by the Attorney General.

Complainant's passenger steamer, Colombo, sails from Italy for the United States on October 27, 1922 and others of complainant's vessels will shortly from time to time thereafter be sailing from Italy, and unless restrained the defendants intend, as complainant is informed and believes, on arrival of said vessels within the United States, to seize all wines, liquors or other intoxicating liquors on board, included in the sea stores of said vessels and threaten so to seize the vessels themselves possessing said liquors in violation of said National Prohibition Act, and being subject to the penalties therein provided.

Such seizure of said wines, liquors or other intoxicating beverages constituting part of said sea stores of said vessels for use and consumption of passengers and crew alone as aforesaid, or seizure of complainant's vessels themselves, will disrupt the sailings of complainant's vessels, prevent performance of obligations to passengers and crew incurred with respect thereto, deprive complainant of a large volume of patronage and business, render complainant's property and investment in large part valueless, interrupt the free passage of persons and cargo between Italy and the United States, and otherwise cause loss and damage and difficulties to the complainant, to its great and irreparable loss and injury, and to the general public, and further, that such action will deprive the complainant of its property without due process of law.

XI. Complainant is advised by counsel, and verily believes, that the aforesaid ruling by the Attorney General in respect to  
11 foreign ships carrying intoxicating liquors as sea stores for crew or passengers as aforesaid and any regulations formulated by the Secretary of the Treasury for the enforcement of such ruling are and will be unauthorized and void because neither the Eighteenth Amendment to the Constitution of the United States nor the National Prohibition Act prohibits the carriage or possession of such liquors as such sea stores for crew and passengers as aforesaid, and an interference with the possession of such sea stores would therefore violate complainant's rights under the law and under existing treaties between the United States and Italy, and otherwise would also deprive complainant of its property without due process of law.

XII. Complainant is advised by counsel and believes that if the interpretation placed on the National Prohibition Act by the opinion of the Attorney General as aforesaid, is correct, said Act is unconstitutional and void, for the reason that the Eighteenth Amendment to the Constitution of the United States pursuant to which Congress adopted the said National Prohibition Act, does not authorize prohibition of the possession of intoxicating liquors for beverage purposes, so that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of said Act, it is unconstitutional.

XIII. Complainant alleges that the defendants and their subordinates, and each of them, acting under their direction, are threatening notwithstanding the foregoing, to seize said alcoholic liquors now

constituting sea stores on complainant's vessels, and to enforce against complainant, its officers, agents and servants various fines and penalties including fines and imprisonment and various forfeitures of property provided by the Act of Congress, and regulations, and thus would involve the complainant, its officers, agents and servants in a multiplicity of suits, and by such threats would prevent the complainant, its employees and servants carrying out its contracts, and would deprive complainant of its business and its property without due process of law, all to the irreparable damage of complainant, which such injury and damage would be incapable of admeasurement and adjudication in an action at law.

The threats aforesaid of defendants being immediate, and threatening immediate irreparable injury, the final decree in favor of complainant will be of little value unless the complainant is granted an injunction as prayed for in the bill of complaint during the pendency of this suit.

Forasmuch, therefore, as complainant is without remedy in the premises except in a court of equity, and has no adequate remedy at law, and to the end that it may obtain from this honorable Court the relief to which it is entitled, it respectfully prays that the above named defendants, and each of them, be directed to make a full, true and perfect answer to this bill of complaint but not under oath an answer under oath being expressly waived, and that said defendants, their agents, servants, subordinates and employees, and each and every one of them be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainant, its officers, agents, servants, or employees, or any of them, or complainant's vessels, or other property, any of the pains, penalties or forfeitures provided in and by the aforesaid acts of Congress, or any rules or regulations promulgated thereunder, and from arresting and prosecuting the complainant, its officers, agents, servants or employees, or any of them, and from refusing to issue to the complainant and/or its steamers permits for clearance from Port of New York, or in any way interfering with the arrival or departure of complainant's steamers for or on account of any alleged violation by them or any of them of the Eighteenth Amendment to the Constitution of the United States or the National Prohibition Act, or the regulations thereunder, on the ground or claim that the carriage or possession by the vessels of complainant of intoxicating liquors as aforesaid, as sea stores, for crew and passengers, is contrary to law; and from molesting or in any way interfering with the complainant in the peaceful possession of said intoxicating liquors on board such vessels as part of said sea stores.

Complainant further prays it be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause, whereby defendants, their agents, servants, subordinates and employees, and each and every one of them, may be enjoined and restrained as heretofore prayed, and that upon the final hearing, said injunction be made perpetual.

Complainant further prays that a writ of subpoena be issued herein directed to the said defendants, commanding them on a day certain to appear and answer the bill of complaint herein.

NAVIGAZIONE GENERALE ITALIANA,  
By A. RUPINI, Agent.

GILBERT & GILBERT,  
*Solicitors for Complainant.*

43 Exchange Place, Borough of Manhattan, City of New York.

14 STATE OF NEW YORK,  
*County of New York, ss:*

Angelo Ruspini being duly sworn, says:

I am the Managing Agent in New York, for the complainant herein. I have read the foregoing bill of complaint, and know the contents thereof, and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and the grounds of my belief as to all matters in said bill of complaint not stated to be on my knowledge are documents and other papers in my possession relating to the subject matter of this suit, as well as announcements by Government authorities. That the reason why this verification is not made by the complainant is that it is a foreign corporation.

ANGELO RUPINI.

Sworn to before me this 19th day of October, 1922.

WM. G. PHILLIPS,  
*Notary Public.*

Kings Co., N. Y. No. 35.  
Certificate filed in N. Y. Co. No. 76.  
Kings Co. Register's No. 4033.  
N. Y. Co. Register's No. 4103.

15

#### SCHEDULE A.

(Copy.)

(T. D. 38218.)

#### Sea Stores—Liquors.

Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 106 and 107 of the Customs Regulations of 1915 as amended.

Treasury Department, December 11, 1919.

To Collectors of Customs and Others Concerned:

All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part

thereof to be removed from under seal for use by the crew at meals or for any other purpose.

Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same Line or owner.

Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(Signed)

JOUETT SHOUSE,  
*Assistant Secretary.*

(99623.)

16

#### SCHEDULE B.

(Copy.)

(T. D. 38248.)

#### Sea Stores—Liquors.

Opinion of the Attorney General with respect to the practice under T. D. 38218 of sealing liquors listed as sea stores on vessels while in ports of the United States. Distinction made between American and foreign vessels. T. D. 38218 amended.

Treasury Department, January 27, 1920.

To collectors of customs and others concerned:

Attention is invited to the appended copy of an opinion rendered the Department by the Attorney-General with respect to the Practice under T. D. 38218 of sealing liquors carried as sea stores on all vessels while in the ports of the United States, as indicated by the questions submitted to him.

Following the opinion of the Attorney-General the first paragraph of T. D. 38218 is hereby amended to read as follows:

All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on foreign vessels should be sealed on arrival of the vessel in port, and such portions thereof released from time to time for use by the officers and crew.

The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification.

(108377.)

JOUETT SHOUSE,  
*Assistant Secretary.*

## EXHIBIT C.

17

The Ministerial Decree of May 18th, 1911, approving the schedule of food rations for emigrants travelling to foreign countries, reads:

"The food rations for the emigrants travelling to foreign countries, as per Art. 6 (3) of the Law of January 31st, 1901, No. 23 governing emigration, will be in accordance with the four attached schedules, two of which specify the menus for the meals on the various days of the week, and the other two giving the quality and quantity of food for emigrants on board, and in accordance with the instructions thereof.

The decree of July 13th, 1904, modifying schedule E attached to the regulations of July 10th, 1901, for the application of the Law on emigration, is cancelled.

The present decree shall be registered with the Court and shall go into effect on the 1st day of July of the present year.

Schedule A-B is—Specifying the quality and quantity of food for emigrants on board, referred to in the above Decree, thus:

Description of food as per Schedule A.	Total quantity of food for the week.						
	Mon.	Tues.	Wed.	Thur.	Fri.	Sat.	Sun.
Fresh bread of pure wheat, of good quality, well baked.....Grs.	500	500	500	500	500	500	500
Beef meat, fresh....."	300	150	150	300	...	150	300
Preserved meat, eventually: see note....."	...	...	...	...	...	...	0.100
Macaroni paste, of good quality, of pure grain....."	250	150	200	150	250	70	250
Italian rice of good quality....."	...	80	...	80	...	80	...
Codfish....."	...	100	...	...	100	...	...
Tunny fish in oil....."	...	...	80	...	...	40	...
Salted anchovies, well cleaned....."	...	...	5	...	30	...	...
Pickles....."	40	...	...	40	...	...	...
							0.080





19 & 20 [Endorsed:] Index No. — United States District Court for the Southern District of New York. Navigazione Generale Italiana, Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Bill of Complaint. Copy. Gilbert & Gilbert, Solicitors for Complainant, 43 Exchange Place, New York.

21 U. S. District Court, Southern District of New York.

E. 25/46.

NAVIGAZIONE GENERALE ITALIANA

versus

ANDREW W. MELLON et al.

*Notice of Appearance and Demand.*

You will please take notice that I am retained by, and appear as attorney for, the Defendants in this action, and demand service of a copy of the complaint and all papers in this action upon me, at my office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours,

WILLIAM HAYWARD,  
*United States Attorney,  
Attorney for Defendants.*

New York, October 24, 1922.

To Messrs. Gilbert & Gilbert, Attorneys for Plaintiff.

22 In the District Court of the United States for the Southern District of New York.

NAVIGAZIONE GENERALE ITALIANA, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Answer to Bill of Complaint.*

Now come the defendants herein and in answer to the bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the bill of complaint herein and divers parts thereof be dismissed, and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.
2. The Court has no jurisdiction to grant the relief prayed for or any part thereof.
3. The bill does not present a cause of action in equity under the Constitution of the United States.
4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.
5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.
6. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

23      Second. In answer to the allegations set out in paragraph seventh of the complaint the defendants allege on information and belief that any difficulty which complainant might experience in obtaining adequate crews from among the nationals of countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread would be readily obviated by the payment of higher wages to said crews. Defendants are further informed and believe that many of the vessels of the American merchant marine carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages and that the said American vessels have never had the least difficulty in obtaining adequate crews from the nationals of such countries at the same wages paid to American crews.

Third. Defendants deny the allegations contained in paragraph eleventh of the bill of complaint that the ruling by the Attorney General referred to in said paragraph is and any regulations for the enforcement of such ruling are and will be unauthorized and void. Defendants further deny the allegation that such ruling and such regulations would violate complainant's rights under existing treaties between the United States, Great Britain and otherwise.

Fourth. Defendants deny the allegation contained in paragraph twelfth of the bill of complaint that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is correct, it renders said Act unconstitutional and void for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional.

24      The defendants allege on the other hand that it is well within the power of Congress delegated to it by the Eighteenth Amendment to the Constitution of the United States to declare the possession of in-

toxicating liquor to be unlawful and that such legislative declaration contained in the National Prohibition Act is a valid exercise of the legislative power and has a reasonable relation to the enforcement of the constitutional mandate.

For a separate and distinct defense herein, defendants allege:

Fifth. Defendants re-allege and re-affirm as part of this separate and distinct defense each and every allegation contained in paragraphs First to Fourth above.

Sixth. Defendants are informed by their attorney and therefore allege that if the complainant is correct in its construction of the National Prohibition Act the implications involved are exceedingly serious and the claim of the complainant, if allowed, would carry with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States.

Seventh. Defendants are further informed and believe and therefore allege that for two years last past a large and profitable business has been carried on by divers persons with the object and result of importing liquor into this country contrary to law; that the vessels used by such persons are vessels under foreign registry and such vessels sail from foreign ports with clearance papers showing  
25 that they are bound for other foreign ports. The actual destination of such vessels is not the port shown in their clearance papers but some point on the high seas near the coast of the United States from which its liquors are transferred to smaller boats which complete the smuggling and importation of the liquor into the United States. Up to the present time the vigilance of the customs officials in seizing such vessels when they came within the territorial limits of the United States has somewhat mitigated the evils of this traffic but if, as complainant contends it is only necessary to put liquors under lock and key to make such transportation legal and foreign vessels can sail our territorial waters at will with cargoes of liquor, the enforcement of the prohibition against the importation of liquors, already difficult, will become practically impossible.

Eighth. The rulings of the Secretary of the Treasury referred to in the bill of complaint have already been used as a cloak to hide smuggling operations and if the doctrine underlying such rulings is declared to be the law as claimed by complainant, defendants verily believe that its use as a cloak for such operations will greatly increase. As an instance of the use of such regulations to hide smuggling defendants allege that on or about January 15, 1920, the British passenger steamship "Harbinger" sailed from Halifax, N. S., for Havana, Cuba, carrying with her a large quantity of intoxicating liquors listed as sea stores. The said vessel came into the port of Portland, Maine, alleging a shortage of coal, and there her liquor was sealed under customs seals. Her Master protested her innocence and claimed

26 the right as a foreign vessel to transport intoxicating liquors as sea stores under seal within the territorial waters of the United States. This right was accorded her under the Treas-

ury rulings until recently in force and on which complainant has relied until now. Being under suspicion, however, the "Harbinger" was convoyed by the coastguard cutter "Ossipee" to Cape Ann whence she entered the port of Boston and thence proceeded without convoy to the neighborhood of New York where she was met by the coastguard cutter "Gresham" which convoyed her to New York. On January 26th, she was convoyed down New York Bay by the coastguard cutter "Manhattan" to Dunham Shipyard, Staten Island. There she remained under customs surveillance until February 6th when the customs seals on the liquors were broken by the crew and an attempt was made to import them into the United States. When such attempt was made the crew of said vessel were arrested. Two have plead guilty to a violation of the Prohibition Act and the vessel has been libelled by the Government. After the crew were arrested it became evident that the journey of this vessel down the coast of the United States was not, as alleged and as appeared, because of insufficient coal-carrying space but for the purpose of finding purchasers of the liquor carried as sea stores.

Ninth. Defendants further allege that under the regulations of the Secretary of the Treasury referred to in the complaint herein, customs officers have made no physical inventory of the stores of liquors on any foreign ships either upon their arrival in the ports of the United States or upon their leaving such ports. Permission has been given to remove certain of the liquors under seal for the purpose of rations given to the crews, but no record is kept of the amount of liquor which actually leaves United States ports on foreign vessels, nor is any inventory returned by such foreign vessels of the amount of liquors actually found when seals are broken by the ship's agents after leaving port.

Tenth. Defendants are informed and verily believe that the complainant makes larger profits from the sale of intoxicating liquors on the high seas, such profits amounting to many thousand dollars per annum and further allege that loss of such profit is the only definitely ascertainable loss which the complainant will suffer if the National Prohibition Act as interpreted by the ruling of the Attorney General is given full force and effect.

Eleventh. Defendants further allege on information and belief that the sale of intoxicating liquors on the high seas by vessels carrying the American flag ceased with the issuance of the ruling of the Attorney General and is not now carried on. And defendants verily believe that if vessels of foreign registry are by the injunction of this Court facilitated in the sale of liquor on the high seas by being allowed to transport liquor within the territorial waters of the United States, the resultant damage to the American merchant marine will be great and irreparable. Not only will ships of the American merchant marine suffer the loss of revenue which they have hitherto enjoyed from the sale of intoxicating liquors on the high seas and which ships of foreign nations will continue to enjoy if the prayer of the complainant herein is granted, but defendants believe that a

large number of passengers who would otherwise travel on American ships and who would travel on American ships if both American ships and foreign ships were placed in the same position in regard to the sale of liquor on the high seas, will, if foreign ships are placed in an advantageous position in this regard, travel on foreign ships and the American ships will lose a large amount of revenue thereby. Defendants are informed and verily believe that the loss of such revenue from the sales of liquor and from passage money in case of a differential treatment giving preference to foreign ships over American ships in the matter of transportation of intoxicating liquors within the territorial waters of the United States, will be sufficient to make it impossible for the American merchant marine to compete profitably with ships of foreign registry. The majority of the American passenger liners operating in the North Atlantic trade, in competition with complainant's and other foreign vessels are owned and operated directly by the United States Government. Any loss of revenue by reason of a differential treatment favorable to foreign ships will fall directly on the United States Government and its tax-payers.

Wherefore, defendants pray that the bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,  
*United States Attorney for the Southern  
District of New York, Attorney for  
Defendants.*

Office and P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

30 [Endorsed:] Form No. 336. U. S. District Court, Southern District of New York. Navigazione Generale Italiana. Complainant, versus Andrew W. Mellon and others, Defendants. Answer to Bill of Complaint. William Hayward, United States Attorney, Attorney for Defendants.

31 United States District Court, Southern District of New York

NAVIGAZIONE GENERALE ITALIANA, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States.  
Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

The above entitled suit having been duly brought on for trial by consent of the parties, at a Stated Term of the United States District Court for the Southern District of New York, before Honorable Learned Hand, District Judge, and a motion for a judgment on the

pleadings having been made by the complainant, and a motion to dismiss the bill of complaint having been made by the defendants, and the Court having heretofore, at a Stated Term thereof, held at the United States Post Office Building in the City of New York on the 17th day of October, 1922, before the Honorable Learned Hand, heard extended argument of counsel upon similar motions in like suits by the Oceanic Steam Navigation Company, Ltd., and other complainants, involving similar questions:

It is stipulated that the said motion for judgment in the above entitled suit be, and the same hereby is forthwith submitted without further argument for consideration and decision by the Court.

Dated, New York, October 24, 1922.

GILBERT & GILBERT,  
*Solicitors for Complainant.*  
WILLIAM HAYWARD,  
*United States Attorney for the Southern  
District of New York, Solicitor for  
Defendants.*

[Endorsed:] Index No. —. United States District Court, Southern District of New York. Navigazione Generale Italiana, Complainant, against Andrew W. Mellon, et als., Defendants. Stipulation. Copy. Gilbert & Gilbert, Solicitors for Complainant, Exchange Place, New York.

At a Stated Term of the District Court of the United States for the Southern District of New York, Held in the Court Rooms thereof at the Post Office Building, in the Borough of Manhattan, City of New York, on the 26th Day of October, 1922.

Present: Hon. Learned Hand, District Judge.

E. 25/46.

NAVIGAZIONE GENERALE ITALIANA, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

*Final Decree.*

This cause came on to be heard at this term upon motions by the defendants to dismiss the bill of complaint and by the complainant for a final decree in its favor on the pleadings, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the bill of complaint herein be dismissed and defendants have judgment against the complainant for their costs to be taxed, and it is further

Ordered, adjudged and decreed that until final hearing of this cause in the Supreme Court of the United States and the entry of an order or decree on the mandate of that Court, the defendants, their servants, agents and subordinates, be and they hereby are  
 36 stayed and restrained from seizing or interfering with the possession or carriage by complainant herein of a stock of liquors customary for the rations of the crews of complainant's vessels upon each east bound voyage, upon the filing of a bond in the penal sum of twenty-five thousand (\$25,000) dollars, conditioned against the gift, issuance or sale of such stock of liquors by complainant otherwise than as crews' rations to the crews of complainant's vessels, and it is further

Ordered, adjudged and decreed that if complainant shall fail to take an appeal herein to the Supreme Court of the United States within five days from the entry hereof, or to move for preference on the first motion day of the Supreme Court, the defendants may move herein to vacate the injunction granted above.

LEARNED HAND,

*U. S. D. J.*

October 26, 1922.

Consented to.

WM. HAYWARD,

*U. S. Attorney, Solicitor for Defendant.*

37 & 38 [Endorsed:] Index No. E. 25/46. United States District Court, Southern District of New York. Navigazione Generale Italiana, Complainant, against Andrew W. Mellon, Secretary of the Treasury, et als., Defendants. Final Decree. Copy. Gilbert & Gilbert, Solicitors for Complainant, 43 Exchange Place, New York.

Due, proper and timely service of the within decree & notice of settlement is hereby admitted this 26 day of October, 1922.

*Solicitor for Defendants.*



39 In the District Court of the United States for the Southern District of New York.

NAVIGAZIONE GENERALE ITALIANA, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, Defendants.

*Petition for Appeal.*

The complainant above named, Navigazione Generale Italiana, conceiving itself aggrieved by the final judgment and decree entered herein October 27, 1922, does hereby appeal from said final judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, from which it appears that this cause is appealable directly from this Court to the said Supreme Court under Section 238 of the Judicial Code, and said Navigazione Generale Italiana prays that it be allowed this appeal and that a transcript of the record papers and proceedings upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

GILBERT & GILBERT,  
*Solicitors for Complainant.*

The foregoing appeal is hereby allowed as prayed for.

LEARNED HAND,  
*U. S. D. J.*

To: Hon. William Hayward, United States Attorney.  
Alexander Gilchrist, Jr., Esq., Clerk, United States District  
Court, Southern District of New York.

40 & 41 [Endorsed:] United States District Court, Southern District of New York. Navigazione Generale Italiana, Complainant, against Andrew W. Mellon, Secretary of the Treasury, et als., Defendants. Petition for Appeals. Copy. Gilbert & Gilbert, Attorneys for Complainant, 43 Exchange Place, New York.

- 42 In the United States District Court for the Southern District of New York.

NAVIGAZIONE GENERALE ITALIANA, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, Defendants.

*Assignment of Errors.*

The complainant hereby assigns error in the final judgment or decree of the District Court herein entered October 27, 1922, in the following respects:

First. The Court erred in dismissing the bill of complaint herein.

Second. The Court erred in denying the petition for an injunction.

Third. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States prohibits a foreign ship from keeping on board while on the territorial waters of the United States intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

43 Fourth. The Court erred in holding that the National Prohibition Act prohibits a foreign ship from keeping on board, while on the territorial waters of the United States, intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the crew as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Sixth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the passengers as part of their customary rations by the law of the ship's

flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Seventh. That the National Prohibition Act as construed and applied by the District Court is unconstitutional and void because enforcement thereof with respect to sea stores on the complainant's vessels would deprive the complainant of its property and subject it to penalties without due process of law.

Eighth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the third and fourth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Ninth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the Fifth and Sixth Assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Tenth. The Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverages in the circumstances mentioned in the Third, Fourth, Fifth and Sixth assignments of error is prohibited by the Eighteenth Amendment and the National Prohibition Act.

Eleventh. The Court erred in refusing to hold that the interpretation of the National Prohibition Act mentioned in the Ninth assignment of error was unconstitutional and invalid and not within the powers conferred by Congress by the Constitution.

Wherefore complainant-appellant prays that said decree or judgment of the United States District Court for the Southern District of New York be reversed and an injunction granted the complainant as prayed for in the bill of complaint herein, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, October 27, 1922.

GILBERT & GILBERT,  
*Solicitors for Complainant.*

[Endorsed:] United States District Court, Southern District of New York. Navigazione Generale Italiana, Complainant, against Andrew W. Mellon, Secretary of the Treasury, et als., Defendants. Assignment of Errors. Copy. Gilbert & Gilbert, Attorneys for Complainant, 43 Exchange Place, New York.

48 In the United States District Court for the Southern District of New York.

NAVIGAZIONE GENERALE ITALIANA, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the  
Port of New York, and Ralph A. Day, Federal Prohibition Director  
for the State of New York, Defendants.

*Assignment of Errors.*

The complainant hereby assigns error in the final judgment or decree of the District Court herein entered October 25, 1922, in the following respects:

First. The Court erred in dismissing the bill of complaint herein.

Second. The Court erred in denying the petition for an injunction.

Third. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States prohibits a foreign ship from keeping on board while on the territorial waters of the United States intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fourth. The Court erred in holding that the National Prohibition Act prohibits a foreign ship from keeping on board, while on the territorial waters of the United States, intoxicating beverages  
49 constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the crew as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Sixth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the passengers as part of their customary rations by the law of the ship's

flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Seventh. That the National Prohibition Act as construed and applied by the District Court is unconstitutional and void because enforcement thereof with respect to sea stores on the complainant's vessels would deprive the complainant of its property and subject it to penalties without due process of law.

Eighth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the third and fourth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Ninth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the fifth and sixth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Tenth. The Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverages in the circumstances mentioned in the third, fourth, fifth and sixth assignments of error is prohibited by the Eighteenth Amendment and the National Prohibition Act.

Eleventh. The Court erred in refusing to hold that the interpretation of the National Prohibition Act mentioned in the ninth assignment of error was unconstitutional and invalid and not within the powers conferred by Congress by the Constitution.

Wherefore complainant-appellant prays that said decree or judgment of the United States District Court for the Southern District of New York be reversed and an injunction granted the complainant as prayed for in the bill of complaint herein, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, October 27, 1922.

GILBERT & GILBERT,  
*Solicitors for Complainant.*

[Endorsed:] United States District Court, Southern District of New York. Navigazione Generale Italiana, Complainant, against Andrew W. Mellon, Secretary of the Treasury, et al., Defendants. Assignment of Errors. Copy. Gilbert & Gilbert, Attorneys for Complainant, 43 Exchange Place, New York.

54 In the District Court of the United States for the Southern District of New York.

NAVIGAZIONE GENERALE ITALIANA, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuard, Acting Collector of Customs for the Port of New  
York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, Defendants.

*Petition for Appeal.*

The complainant above named, Navigazione Generale Italiana, conceiving itself aggrieved by the final judgment and decree entered herein October 27, 1922, does hereby appeal from said final judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, from which it appears that this cause is appealable directly from this Court to the said Supreme Court under Section 238 of the Judicial Code, and said Navigazione Generale Italiana prays that it be allowed this appeal and that a transcript of the record papers and proceedings upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

GILBERT & GILBERT,  
*Solicitors for Complainant.*

The foregoing appeal is hereby allowed as prayed for.

LEARNED HAND,  
U. S. D. J.

To Hon. William Hayward, United States Attorney.  
Alexander Gilchrist, Jr., Esq., Clerk United States District  
Court, Southern District of New York.

55 & 56 [Endorsed:] United States District Court, Southern District of New York. Navigazione Generale Italiana, Complainant, against Andrew W. Mellon, Secretary of the Treasury, et als., Defendants. Petition for Appeal. Copy. Gilbert & Gilbert, Attorneys for Complainant, 43 Exchange Place, New York.

57 & 58 By the Honorable Learned Hand, One of the United States District Judges for the Southern District of New York, in the Second Circuit, to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Greeting:

You are hereby cited and admonished to be and appear before a United States Supreme Court, to be holden in the City of Wash-

ington, in the District of Columbia, within 30 days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Navigazione Generale Italiana is appellant and you are appellees to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 27th day of October, in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

LEARNED HAND,

*United States Judge for the Southern  
District of New York, in the Second Circuit.*

59 In the District Court of the United States for the Southern  
District of New York.

NAVIGAZIONE GENERALE ITALIANA, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for the  
State of New York, Defendants.

It is hereby stipulated and agreed by the solicitors for the respective parties hereto that the foregoing is a true transcript of the record herein as agreed upon by the parties.

Dated, New York, October 27, 1922.

WILLIAM HAYWARD,  
*United States Attorney,  
Solicitor for the Defendants.*  
GILBERT & GILBERT,  
*Solicitors for Plaintiff.*



60 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

NAVIGAZIONE GENERAL ITALIANA, Complainant,  
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;  
Henry C. Stuart, Acting Collector of the Customs for the Port of  
New York, and Ralph A. Day, Federal Prohibition Director for  
the State of New York, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the  
United States of America for the Southern District of New York, do  
hereby certify that the foregoing is a correct transcript of the record  
of the said District Court in the above entitled matter as agreed on  
by the parties.

In testimony whereof, I have caused the seal of the said Court to  
be hereunto affixed at the City of New York, in the Southern District  
of New York, this 30th day of October in the year of our Lord one  
thousand nine hundred and twenty two and of the Independence of  
the said United States the one hundred and forty-seventh.

[Seal of the District Court of the United States, Southern Dis-  
trict of N. Y.]

ALEX GILCHRIST, JR., *Clerk.*

Endorsed on cover: File No. 29,227. S. New York D. C. U. S.  
Term No. 678. Navigazione Generale Italiana, appellant, vs. Andrew  
W. Mellon, Secretary of the Treasury of the United States, et al.  
Filed November 2d, 1922. File No. 29,228.

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

**No. 693.**

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INTERNATIONAL MERCANTILE MARINE COMPANY,  
APPELLANT,

*vs.*

H. C. STUART, ACTING COLLECTOR OF CUSTOMS FOR THE  
PORT OF NEW YORK; RALPH A. DAY, FEDERAL PRO-  
HIBITION DIRECTOR FOR THE STATE OF NEW YORK;  
JOHN D. APPLEBY, CHIEF ZONE OFFICER, *ET AL.*

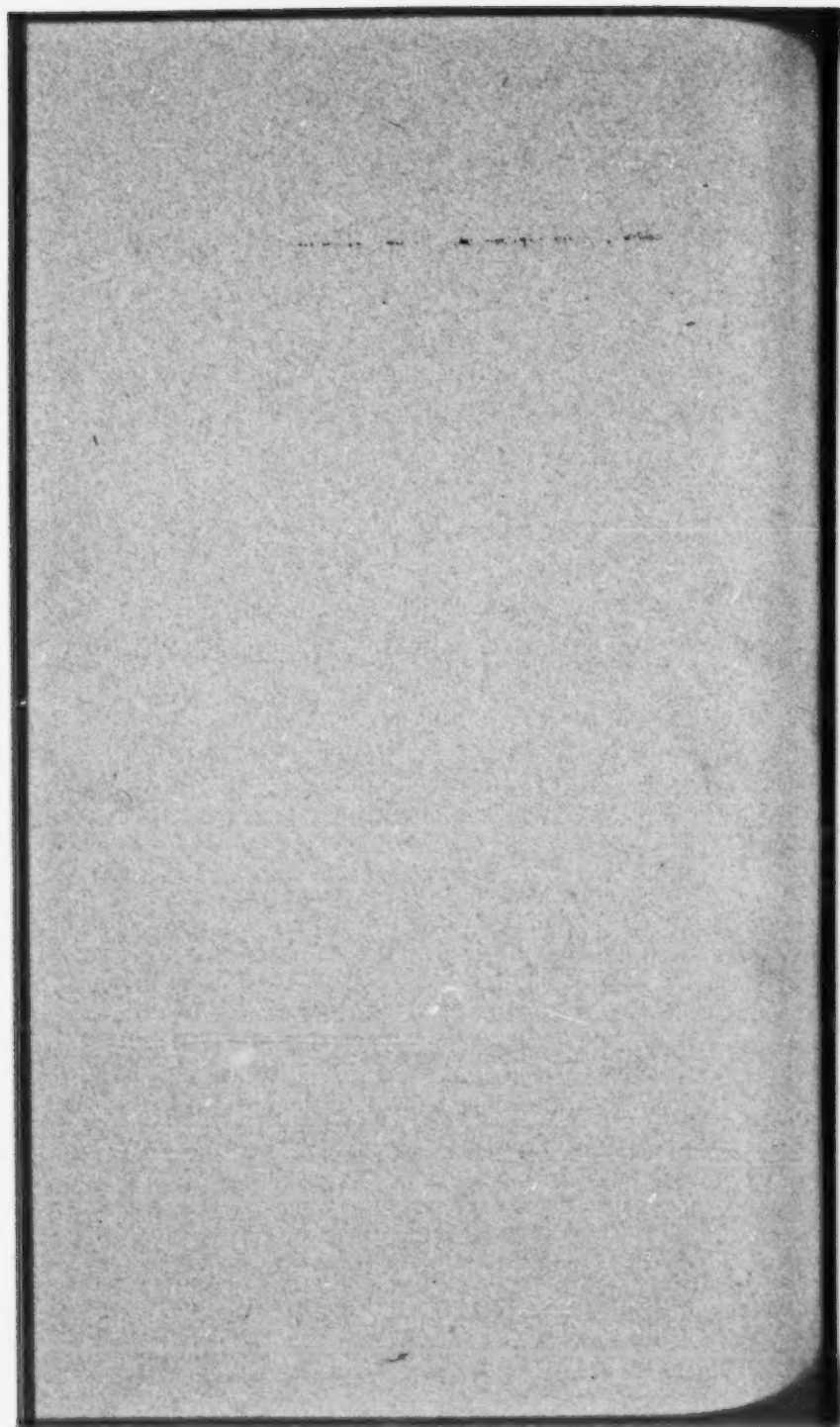
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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FILED NOVEMBER 10, 1922.

**(29,243)**



(29,243)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 693.

INTERNATIONAL MERCANTILE MARINE COMPANY,  
APPELLANT,

*vs.*

H. C. STUART, ACTING COLLECTOR OF CUSTOMS FOR THE  
PORT OF NEW YORK; RALPH A. DAY, FEDERAL PRO-  
HIBITION DIRECTOR FOR THE STATE OF NEW YORK;  
JOHN D. APPELBY, CHIEF ZONE OFFICER, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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1 In the District Court of the United States, Southern District of New York.

In Equity.

INTERNATIONAL MERCANTILE MARINE COMPANY, Complainant,  
against

H. C. STUART, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York; John D. Appleby, Chief Zone Officer, and William Hayward, United States Attorney for the Southern District of New York.

*Bill of Complaint.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity:

The complainant International Mercantile Marine Company, a corporation, brings this its bill of complaint against the above-named defendants, and respectfully shows unto this Honorable Court as follows:

First. The complainant International Mercantile Marine Company is a corporation duly organized and existing under the laws of the State of New Jersey, and is and at all the times hereinafter mentioned, was the owner of the American steamships St. Paul, Finland and Kroonland.

Second. The complainant is informed and verily believes, and therefore alleges on information and belief, that the defendant H. C. Stuart is a citizen and resident of the State of New York and is Acting Collector of Customs for the Port of New York, and  
2 that the said defendant is by law charged with certain duties in connection with the enforcement of the terms and provisions of the Act of Congress and regulations and decisions of the Secretary of Treasury hereinbelow referred to within the Port of New York.

Third. The complainant is informed and verily believes, and therefore alleges on information and belief, that the defendant Ralph A. Day is a citizen and resident of the State of New York, and is the Federal Prohibition Director for the State of New York, and that the said defendant is by law charged with certain duties in connection with the enforcement of the terms and provisions of the Acts of Congress and the regulations and decisions of the Secretary of Treasury hereinbelow referred to, within this District.

Fourth. The complainant is informed and verily believes, and therefore alleges on information and belief that the defendant John

D. Appleby is a citizen and resident of the State of New York and a Zone Officer for this Zone, and that the said defendant is by law charged with certain duties in connection with the enforcement of the terms and provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury hereinbelow referred to.

Fifth. The complainant is informed and verily believes, and therefore alleges on information and belief that the defendant William Hayward is a citizen and resident of the State of New York, and is the United States Attorney for the Southern District of New York.

3 Sixth. This is a suit of civil nature, arising under the Constitution of the United States. The matter in controversy exceeds the sum of Three thousand dollars in value, exclusive of interest and costs. The complainant is engaged in carrying on a steamship business, and has, for about twenty years, been and now is engaged in the business of transporting as common carrier, passengers and cargo for hire on the high seas, between ports of the United States and ports in Europe, and in transacting such business complainant owns, maintains and operates steamships which sail from various ports in the United States to various ports in Europe.

Seventh. The complainant further alleges that the steamships St. Paul, Finland and Kroonland are worth approximately \$2,000,000.

Eighth. For upwards of twenty years, in connection with the operation of the steamers above-mentioned, the complainant has kept, as part of the regular sea stores of said vessels, wines and other intoxicating liquors which were sold in foreign ports and on the high seas for the convenience of its passengers, many of whom are of nationalities who habitually use wines and other intoxicating liquors as a part of their regular diet.

Ninth. For many years prior to and since the adoption of the so-called National Prohibition Act of October 28, 1919, complainant has been permitted to keep intoxicating liquors as part of the sea stores of the above-named steamers, and to sell the same on the high seas and in foreign ports. Whilst on the high seas and in  
4 foreign ports, the vessels of the complainant were not territory subject to the jurisdiction of the United States within the meaning of the Eighteenth Amendment to the Constitution, or subject to the laws which have been enacted for the enforcement of the provisions of the said amendment.

Tenth. None of the intoxication liquors, so kept as sea stores, have been manufactured, sold or transported within, imported into, or exported from the United States or any territory subject to the jurisdiction of the United States.

Eleventh. Subsequent to October 28, 1919, all wines and other intoxicating liquors kept as part of the regular sea stores on the above-named vessels have been lawfully acquired in foreign ports, and since October 28, 1919, all intoxicating liquors so kept as sea



stores, have been securely locked up prior to the vessel's entering the territorial waters of the United States, and have been thereafter sealed up by the officials of the Treasury Department on arrival at Quarantine and have been kept sealed until the vessel again reached the high seas on its outward voyage. At no time have the said intoxicating liquors kept as sea stores been used by the passengers or crew whilst the vessel was within the territorial waters of the United States.

5 Twelfth. The foregoing procedure was followed in pursuance of regulations embodied in Treasury Decisions No. 38218 of December 11, 1919, and No. 38248 of January 27, 1920, copies of which are hereto annexed as Schedules A and B hereof, which were promulgated under authority vested in the Secretary of the Treasury by the National Prohibition Act.

Thirteenth. In reliance upon and under the authority of the above-mentioned Treasury decisions and the regulations promulgated in connection therewith and the procedure always followed as above-described, the complainant, in good faith, purchased in foreign ports and now has on board the steamers above-mentioned, as sea stores, sealed as required by the regulations, quantities of intoxicating liquors of a value in excess of \$3,000, on the steamers St. Paul and Finland.

Fourteenth. Under date of October 5, 1922, the Attorney General of the United States transmitted an opinion the Secretary of the Treasury and in that opinion stated that the Eighteenth Amendment to the Constitution and the National Prohibition Act applied to American ships on the high seas and in foreign ports and that the practice of selling liquors on American ships outside of the territorial waters of the United States was not permissible under the laws; and further that the sale, transportation or possession of intoxicating liquors for beverage purposes on foreign vessels while in territorial waters of the United States is prohibited by the said law.

6 Fifteenth. Subsequently the President of the United States addressed the following letter to the Secretary of the Treasury:

"Washington, Oct. 6, 1922.

"MY DEAR MR. SECRETARY:

I have asked the Attorney General to place in your hands his ruling relating to the application of the Eighteenth Amendment and the Volstead Act to the service and the transportation of intoxicating liquors on American ships at sea and the transportation of intoxicating liquors on all vessels within American waters. The ruling, you will note, holds all transportation in American waters to be contrary to a recent decision of the Supreme Court, and transportation and traffic on American vessels to be wholly contrary to law. I have directed the Chairman of the United States Shipping Board to order immediate observance of the law on all Government vessels, and desire you to give like notice to the masters of all privately owned ships operating under the American flag.

You will note that the ruling holds the possession or transportation of all intoxicating liquors by foreign ships in American waters to be contrary to the decision of the court. You will therefore proceed to the formulation of regulations for the enforcement of the law, and such notice to the agents of foreign shipping lines touching American ports or docking therein as becomes the circumstances and

7

commits us to full enforcement of the law.

"Very truly yours,

"WARREN G. HARDING.

"Washington, October 7, 1922.

Hon. A. W. Mellon,  
Secretary of the Treasury,  
Washington, D. C.

"MY DEAR MR. SECRETARY:

Supplementing my letter of instruction of October 6, relating to the enforcement of the Eighteenth Amendment and the prohibition enforcement act as applied to carriers at sea, you will please direct United States customs officials to give notice to all shipping lines that, pending the formulation of regulations, the enforcement of the prohibition of transportation and ship stores will not be practicable in the case of foreign vessels leaving their home ports or American vessels leaving foreign ports on or before October 14, 1922. Any earlier attempt at enforcement in the absence of due notice and ample regulations would be inconsistent with just dealing and have a tendency to disrupt needlessly the ways of commerce.

"This delay in full enforcement does not apply to the sale of intoxicating liquors on vessels sailing under the American flag.

"Very truly yours,

"WARREN G. HARDING.

8

Hon. A. W. Mellon,  
Secretary of the Treasury,  
Washington, D. C."

Sixteenth. The steamship St. Paul with a quantity of intoxicating liquors on board as sea stores lawfully acquired in foreign ports, in reliance on and securely locked up and sealed in accordance with the Treasury decisions and regulations hereinbefore set forth, is now in the Port of New York, lying at Pier 62, North River.

Seventeenth. The Steamship Finland with a quantity of intoxicating liquors on board as sea stores, lawfully acquired in foreign ports in reliance on, and securely locked up and sealed in accordance with the Treasury decisions and regulations above set forth, is now in the Port of New York and is scheduled to sail from the Port of New York on October 14, 1922.

Eighteenth. The steamship Kroonland is now in the Port of Antwerp, Belgium, scheduled to sail from New York on October 12, 1922.

Nineteenth. The intoxicating liquors above-mentioned, forming part of the regular sea stores of the steamships St. Paul and Finland, now lying in the Port of New York, were legally acquired before the complainant had received any notice or intimation from the Government authorities that there was to be a departure from the practice outlined in the Treasury decisions and regulations above set forth with which complainant has always fully complied in all respects.

9 Twentieth. On October 10, 1922, the United States Custom officials, regularly assigned to piers leased and controlled by the complainant in the City of New York, informed John Watson, General Wharf Superintendent for the complainant at the Port of New York, that they had received instructions issued by the authority of the Acting Collector of Customs at the Port of New York to the effect that prohibition enforcement agents of the United States Government were about to seize the intoxicating liquors kept as sea stores on the steamship St. Paul, and that they were directed to lend all assistance to these prohibition enforcement agents in connection with such threatened seizure.

Twenty-first. Complainant verily believes that acting under orders of the Secretary of the Treasury, and of the Federal Prohibition Director of the State of New York, the prohibition enforcement agents and other Government agents will seize or attempt to seize intoxicating liquors now sealed as sea stores aboard the steamship Finland and also on the steamship Kroonland when she arrives at the Port of New York.

Twenty-second. Complainant is advised by counsel and verily believes that the opinion of the Attorney General of the United States is erroneous and that the Eighteenth Amendment and the National Prohibition Act do not apply to intoxicating liquors legally acquired in foreign ports in good faith, kept as sea stores and sealed on arrival as aforesaid in pursuance of the Treasury decisions and regulations above referred to, and that the threatened actions of the  
10 Secretary of the Treasury, the Federal Prohibition Director of the State of New York and the Acting Collector of Customs of the Port of New York, prohibition enforcement agents and other United States Government agents in seizing or attempting to seize any of the intoxicating liquors above-mentioned, carried as sea stores, are improper, unauthorized, void and without warrant of law and interfere with the constitutional rights of the complainant.

Twenty-third. The intoxicating liquors aboard the above-mentioned steamers are of great value and complainant verily believes that if these intoxicating liquors, kept as sea stores, are seized and taken into the possession of minor officials of the United States Government, that said liquors will be destroyed or wasted. The complainant is entitled, pending the final decision of this cause, to have the said sea stores of said steamers, remain intact so that if case the decision should be in the complainant's favor, its property will not have disappeared, or if the decision shall be against it, it may be

able to secure the necessary permits to take the said sea stores out of the United States in order to dispose of them without loss of property lawfully acquired and possessed by it in reliance, and under the authority of the aforesaid regulations and decisions of the Treasury Department. If the said sea stores are seized, the complainant will be deprived of the lawful possession of them, and of the right and opportunity to sell the said sea stores on the high seas and in foreign ports.

11      Twenty-fourth. The complainant alleges, on information and belief, that the Secretary of the Treasury or the Commissioner of Internal Revenue, under authority of the Secretary of the Treasury, has not yet issued any decision or promulgated any regulations contrary to the Treasury decisions above quoted, and on information and belief, said Treasury decisions and regulations remain outstanding.

Twenty-fifth. On information and belief, the complainant alleges that such decisions and regulations are now in the course of preparation by the Treasury Department in accordance with the opinion of the Attorney General of the United States above referred to, and that when they are issued, there will be an attempt made to enforce the new rulings by the Acting Collector of the Port of New York, the Federal Prohibition Director of New York State, the United States Attorney for the Southern District of New York, and other officers and agents of the Government, and the aforesaid sea stores of the complainant will be seized to its immediate and irreparable damage.

Twenty-sixth. The complainant has no adequate remedy at law and unless an injunction is granted against the defendants, the complainant will be immediately and irreparably damaged.

Wherefore, the complainant prays that the Court will decree

1. That a writ of subpoena be issued herein directed to the defendants above-named, demanding that each of them on a day named appear and answer the complaint herein, but not under oath.  
12      the oath being hereby expressly waived.

2. That said defendants, their agents, servants, subordinates and employes, and each and every one of them, be enjoined and restrained from enforcing or attempting to enforce, or causing to be enforced in any manner whatsoever, against the complainant, its officers, agents, servants and employes or any of them, or the said steamships, any of the seizures, pains, forfeitures and penalties provided in and by the aforesaid acts of Congress or any laws or regulations of the Secretary of the Treasury.

3. That said defendants, their agents, servants, subordinates and employes, and each and every one of them, be enjoined and restrained from arresting and prosecuting the complainant, its officers, agents, servants or employes, or any of them, for or on account of

the alleged violations by them or any of them, of the regulations or Acts of Congress on the ground or claim of having intoxicating liquors on board the said vessels, as sea stores, while in the Port of New York.

4. That the said defendants, their agents, servants, subordinates and employes, and each and every one of them be enjoined and restrained from refusing to issue to the complainants and/or its said steamers, permits for clearance from the port of New York, or in any way interfering with the arrival or departure of the steamers with liquor on board, sealed as sea stores.

5. That the said defendants, their agents, servants, subordinates and employes, and each and every one of them, be enjoined and restrained from seizing, molesting or otherwise interfering with the complainants in the peaceful possession of said intoxicating liquors on board the aforesaid vessels, as part of their sea stores.

6. That the defendants, their agents, servants, subordinates and employes, be restrained and enjoined from enforcing against the complainant and/or its steamers, any of the pains, penalties, seizures or forfeitures provided for in the aforesaid Acts of Congress or any laws and regulations of the Secretary of the Treasury, by reason of any sale of liquor carried as sea stores which may be made on the high seas or in foreign ports.

7. That the complainant be granted a restraining order and preliminary injunction pending final hearing and decision of this cause, whereby the defendants, their agents, servants, subordinates and employes, and each and every one of them, shall be enjoined and restrained, as heretofore prayed, and that upon final hearing of this cause, said injunction be made perpetual.

8. That a decree may be entered herein in favor of the complainant against the defendants aforesaid, and

9. That the complainant have such other and further relief as it may be entitled to receive and the justice of the cause may require.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX &  
KEATING,

*Solicitors for Complainant.*

Office and Post Office Address, 27 William Street, Borough of Manhattan, New York City.

STATE OF NEW YORK,  
County of New York, ss:

On the 11th day of October, 1922, before the undersigned, notary public duly commissioned and sworn, appeared J. H. Thomas, who being duly sworn, deposes and says that he is Vice President of the complainant in the above-entitled suit; that the foregoing bill of

complaint is true except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true. The reason that this verification is not made by the complainant itself is that it is a body corporate.

J. H. THOMAS.

Sworn to before me this 11th day of October, 1922.

C. D. SMITH,

*Notary Public, West Co., N. Y.*

Cert. filed in N. Y. County.

Clerk's No. 188. Reg. No. 4310.

Commission expires Mar. 30, 1924.

16

# SCHEDULE A.

(Copy.)

(T. D. 38218.)

Sea Stores—Liquors.

Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 106 and 107 of the Customs Regulations of 1915 as amended.

Treasury Department, December 11, 1919.

To Collectors of Customs and Others Concerned:

All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same Line or owner.

Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(Signed)

JOUETT SHOUSE,  
*Assistant Secretary.*

(99623.)

18

## SCHEDULE B.

(Copy.)

(T. D. 38248.)

## Sea Stores—Liquors.

Opinion of the Attorney General with respect to the practice under T. D. 38218 of sealing liquors listed as sea stores on vessels while in ports of the United States. Distinction made between American and foreign vessels. T. D. 38218 amended.

Treasury Department, January 27, 1920.

To Collectors of Customs and Others Concerned:

Attention is invited to the appended copy of an opinion rendered the Department by the Attorney-General with respect to the practice under T. D. 38218 of sealing liquors carried as sea stores on all vessels while in the ports of the United States, as indicated by the questions submitted to him.

Following the opinion of the Attorney-General the first paragraph of T. D. 38218 is hereby amended to read as follows:

All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports 19 & 20 of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on foreign vessels should be sealed on arrival of the vessel in port, and such portions thereof released from time to time for use by the officers and crew.

The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification.

(108,377.)

JOUETT SHOUSE,

*Assistant Secretary.*

21 [Endorsed:] United States District Court, Southern District of New York. International Mercantile Marine Co., Complainant, vs. H. C. Stuart, Acting Collector of Customs, etc., et al. Bill of Complaint. Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for Complainant, 27 William Street, New York, N. Y.

22 District Court of the United States, Southern District of New York.

In Equity.

INTERNATIONAL MERCANTILE MARINE COMPANY, Complainant,  
against

H. C. STUART, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York; John D. Appleby, Chief Zone Officer, and William Hayward, United States Attorney for the Southern District of New York Defendants.

*Order Granting Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Be Granted Pendente Lite.*

The Court having read the annexed bill of complaint, and being satisfied that there is danger that immediate and irreparable loss or damage will result to the complainant before this motion can be heard unless a temporary restraining order is granted to preserve the situation as it now is, and due deliberation having been had, it is now by the Court

Ordered:

23 1. That the defendants herein show cause before this Court in Court Room 237 in the Woolworth Building, on Tuesday, October 17, 1922, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made herein restraining the defendants, their successors, agents, servants and subordinates, during the pendency of this suit, from seizing, distraining, removing or in any way interfering with the intoxicating liquors now on board the steamship St. Paul and Finland in the port of New York as sea stores, and why the defendants, their agents, servants and subordinates, during the pendency of this suit should not be restrained from arresting and prosecuting the complainant, its officers, agents, servants or employees, or any of them, or from attempting any seizure or forfeiture of any intoxicating liquors carried as sea stores on board the complainant's vessel St. Paul and Finland, by reason of the fact that such intoxicating liquors may be sold on the high seas and in foreign ports.

2. That the complainant have leave, up to the time fixed for the argument of this order to show cause, to serve such further additional papers and affidavits in support of this motion for an injunction pendente lite in this action as it may be advised.

24 & 25 3. Pending the determination of the motion on this order to show cause, the defendants, except the district attorney, their successors, agents, servants and subordinates, be and



they hereby are restrained from seizing, disturbing or removing or in any way interfering with the intoxicating liquors now on board the steamships St. Paul and Finland in the port of New York as sea stores; and the defendants, except the district attorney, their successors, agents, servants and subordinates, be and they hereby are restrained from arresting and prosecuting the complainant, its officers, agent, servants or employees, or any of them, or from attempting any seizure or forfeiture of any intoxicating liquors carried as sea stores on board the complainant's vessels St. Paul, Finland and Kroonland, or of the said steamships, by reason of the fact that such intoxicating liquors may be sold on the high seas and in foreign ports.

4. It is further ordered that service of a copy of this order on the defendants on or before October 14, 1922, shall be, and shall be deemed to be, sufficient service, and said service may be made by personal service thereof on the said defendants or by leaving a copy of this order at the offices of the said defendants.

Dated, New York, October 12, 1922, 12:30 P. M.

LEARNED HAND,

*United States District Judge.*

26 [Endorsed:] United States District Court, Southern District of New York. International Mercantile Marine Company, Complainant, against H. C. Stuart, et al., Defendants. Order, Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for Complainant, 27 William Street, New York, N. Y.

27 District Court of the United States, Southern District of New York.

In Equity.

INTERNATIONAL MERCANTILE MARINE COMPANY, Complainant,  
against

H. C. STUART, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York; John D. Appleby, Chief Zone Officer, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

*Bond on Application for Restraining Order and Preliminary Injunction.*

Know all men by these presents, that International Mercantile Marine Company, a corporation of New Jersey, as principal, and Indemnity Insurance Company of North America, a corporation of Pennsylvania, as surety, are held and firmly bound unto H. C. Stuart, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New

28 York, John D. Appleby, Chief Zone Officer, and William Hayward, United States Attorney for the Southern District of New York, in the sum of One thousand (\$1,000) Dollars, to payment of which they bind themselves, and their successors firmly by these presents.

Dated, New York, this 11th day of October, 1922. The condition of the above obligation is such that

Whereas the International Mercantile Marine Company, a corporation of New Jersey, has filed in the equity side of the District Court of the United States for the Southern District of New York, a bill of complaint against the said H. C. Stuart, Ralph A. Day, John D. Appleby and William Hayward, and has obtained the allowance of a restraining order on a motion for a preliminary injunction as prayed for in said bill from said Court:

29 Now, therefore, if the said International Mercantile Company and the said Indemnity Insurance Company of North America will abide by the decision of the said Court and pay all damages and costs which may accrue to the defendants above named by reason of the said restraining order and/or the preliminary injunction prayed for in the said bill, in case the said restraining order and/or injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force and virtue.

[SEAL.] INDEMNITY INSURANCE COMPANY OF  
NORTH AMERICA,

By GEO. H. SCHNEIDER,  
*Resident Vice President.*

Attest:

E. M. MCCARTHY,  
*Resident Assistant Secretary.*

INTERNATIONAL MERCANTILE MARINE  
COMPANY,

By M. THOMAS.

30 STATE OF NEW YORK,  
*County of New York, ss:*

On this 11th day of October, 1922, before me personally came John H. Thomas, to me known and who being by me duly sworn, deposes and says:

That he resides at New York City; that he is vice-president of the International Mercantile Marine Company, the corporation described in and which executed the foregoing bond; that he knows the seal of said corporation; that the seal affixed to said bond is such corporate seal; that the same was thereto affixed by order of the Board of Directors of the said corporation and that he signed his name thereto by like order.

C. D. SMITH,  
*Notary Public.*

## 31 &amp; 32 Indemnity Insurance Company of North America.

*Affidavit, Acknowledgment and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,

*County of New York, ss:*

On this 11th day of October one thousand nine hundred and twenty-two before me personally came Geo. H. Schneider, known to me to be the Resident Vice-President of the Indemnity Insurance Company of North America, the corporation described in and which executed the within and foregoing Bond of International Mercantile Marine Company as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said Indemnity Insurance Company of North America, is duly and legally incorporated under the laws of the State of Pennsylvania; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of International Mercantile Marine Company is the corporate seal of said Indemnity Insurance Company of North America, and was thereto affixed by the order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with E. M. McCarthy and knows him to be the resident Assistant Secretary of said Company; that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors; and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution, exceed its debts and liabilities of every nature whatsoever, by more than the sum of One Million Five Hundred Thousand (\$1,500,000) Dollars.

That Wm. A. Thompson is the agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

[Seal of Indemnity Insurance Company of North America, Incorporated, Pennsylvania, 1920.]

GEO. H. SCHNEIDER.  
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 11th day of October 1922.

[Seal of Robert Sperling, Notary Public, New York County.]

ROBERT SPERLING,

*Notary Public.*

Notary Public, New York County.

Clerk's No. 372 Register's No. 4089.

Certificate Filed in Kings County.

Clerk's No. 128 Bronx Co., Clk's. No. 2.

Commission expires March 30, 1924.

33 [Endorsed:] United States District Court, Southern District of New York. International Mercantile Marine Company, Complainant, against H. C. Stuart et al., Defendants. Bond on Application for Restraining Order and Preliminary Injunction. Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for Complainant, 27 William Street, New York, N. Y.

34

*Equity Subpoena.*

The President of the United States of America to H. C. Stuart, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York; John D. Appleby, Chief Zone Officer, and William Hayward, United States Attorney for the Southern District of New York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by International Mercantile Marine Company, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two Hundred and Fifty Dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 13th day of October, in the year One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

ALEX GILCHRIST, JR.,

*Clerk.*

KIRLIN, WOOLSEY, CAMPBELL,  
HICKOK & KEATING,

*Complainant's Sol'r.*

The Defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken Pro Confesso.

[SEAL.]

ALEX GILCHRIST, JR.,

Clerk.

35 U. S. District Court, Southern District of New York.

E25/7.

INTERNATIONAL MERCANTILE MARINE COMPANY, Complainant,  
versus

H. C. STUART, Acting Collector of Customs for the Port of New York;  
Ralph A. Day, Federal Prohibition Director for the State of New  
York; John D. Appleby, Chief Zone Officer, and William Hay-  
ward, United States Attorney for the Southern District of New  
York, Defendants.

*Notice of Appearance and Demand.*

You will please take notice that I am retained by, and appear as attorney for, the Defendant in this action, and demand service of a copy of the complaint and all papers in this action upon me, at my office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours,

WM. HAYWARD,

*United States Attorney, Attorney for Defendant.*

New York, Oct. 13, 1922.

To Kirlin, Woolsey, Campbell, Hickox & Keating, Esqs., 27 William St., Attorney for Plaintiff.

[Endorsed:] E25 7. U. S. District Court, Southern District of New York. International Mercantile Marine Company, Complainant, versus H. C. Stuart, Acting Collector of Customs for the Port of New York et al., Defendants. Notice of Appearance. Wm. Hayward, United States Attorney, Attorney for Defendant. Due service of a copy of the within Notice is hereby admitted. Dated the 13 day of Oct., 1922. To Kirlin, Woolsey, Campbell, Hickox & Keating, Esqs., Plaintiff's Attorney, 27 William St.

36 In the District Court of the United States, Southern District of New York.

In Equity.

INTERNATIONAL MERCANTILE MARINE COMPANY, Complainant,  
against

H. C. STUART, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York; John D. Appleby, Chief Zone Officer, and William Hayward, United States Attorney for the Southern District of New York.

*Affidavit.*

STATE OF NEW YORK,  
County of New York, ss:

John H. Thomas, being duly sworn, deposes and says:

I am Vice President of the Complainant herein. On October 12, 1922, the following cablegram was received from our agents in Antwerp:

"49 Kroonland liquors landed stop presume authorities understand Belgian Government regulations require 20 bottles Claret every 100 emigrants British Board of Trade regulations require Medical comforts one gallon Brandy per 100 passengers on foreign flag steamers with British emigrants clearing from British  
37 & 38 "ports stop Kroonland has now Medical comforts only comprising two whiskeys 1 sherry which entirely inadequate emergency at sea stop hope this useful information."

On October 13, 1922, the following cablegram was received from Southampton from our agents there:

"Kroonland British Board of Trade demanded schedule quantity Brandy be aboard for medical comforts refused clear ship otherwise stop have therefore undertaken supply Brandy Cherbourg which Commander will strictly retain as medical comforts stop leave you to wire less Commander any instructions necessary stop situation will recur with each American flag steamer embarking third class Southampton."

JOHN H. THOMAS.

Sworn to before me this 16 day of October, 1922.

[SEAL.]

FRANK A. BERNERS,  
Notary Public, Bronx County.

Certificate filed in New York County.  
Certificate filed in Kings County.

39 [Endorsed:] United States District Court, Southern Dist.  
of N. Y. International Mercantile Marine Company, Com-  
plainant, against H. C. Stuart, Acting Collector, etc. et al. Affidavit.  
Kirlin, Woolsey, Campbell, Hickox & Keating, Solicitors for Com-  
plainant, 27 William Street, New York, N. Y.

40 United States District Court, Southern District of New York.

INTERNATIONAL MERCANTILE MARINE COMPANY, Complainant,  
against

H. C. STUART, Acting Collector of Customs for the Port of New  
York; Ralph A. Day, Federal Prohibition Director for the State  
of New York; John D. Appleby, Chief Zone Officer, and William  
Hayward, United States Attorney for the Southern District of  
New York, Defendants.

*Answer to Bill of Complaint.*

Now come the defendants herein and in answer to the amended  
bill of complaint by their attorney William Hayward, United States  
Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the amended bill of complaint herein  
and divers parts thereof be dismissed, and assign the following  
grounds for this motion, namely:

1. The suit is in effect one against the United States and does  
not aver or show that the United States has consented to be sued  
herein.

2. The Court has no jurisdiction to grant the relief prayed for or  
any part thereof.

3. The bill does not present a cause of action in equity  
41 under the Constitution of the United States.

4. The bill does not disclose a cause of action equitable in its  
nature, civil in its character and arising under the Constitution of  
the United States.

5. The facts alleged in the bill are insufficient to constitute a  
valid cause of action in equity.

6. It appears from the bill that the complainant has a plain,  
adequate and complete remedy at law.

Second. Defendants deny so much of Paragraph "Ninth" of the  
bill of complaint as alleges that whilst on the high seas and in  
foreign ports, the vessels of the complainant are not territory subject  
to the jurisdiction of the United States within the meaning of the  
Eighteenth Amendment to the Constitution or subject to the laws  
which have been enacted for the enforcement of the provisions of  
the said amendment.

Third. Defendants deny the allegations contained in Paragraph "Tenth" of the complaint.

Fourth. Defendants deny the allegations of Paragraph "Twenty-second" of the complaint to the effect that the opinion of the Attorney General of the United States is erroneous and that the Eighteenth Amendment and the National Prohibition Act do not apply to intoxicating liquors legally acquired in foreign ports; and the defendant further deny that the threatened actions of the officials of the United States adverted to in Paragraph 42 & 43 "Twenty-second" of complaint are improper, unauthorized, void and without warrant of law and deny that such threatened actions would interfere with the constitutional rights of the complainant.

Fifth. Defendants deny so much of Paragraph "Twenty-third" of the complaint as alleges that the possession of intoxicating liquors by the complainant on the ships mentioned in the complaint is a legal possession thereof and deny the rights of the complainant to possess such liquors within the United States or to transport such liquors within the territorial waters of the United States, whether under seal or not.

Wherefore, defendants pray that the amended bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,

*United States Attorney for the  
Southern District of New York.  
Attorney for Defendants.*

Office & P. O. Address, U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

44 [Endorsed:] U. S. District Court, Southern District of N. Y. International Mercantile Marine Co., Complainant, vs. H. C. Stuart, etc. Answer to Bill of Complaint. William Hayward, U. S. Attorney, Att'y for Defendants. Kirlin, Woolsey, Campbell, Hickox & Keating, 27 William Street, New York.

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45 United States District Court, Southern District of New York.

In Equity.

25—7.

INTERNATIONAL MERCANTILE MARINE COMPANY, Complainant,  
against

H. C. STUART, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York; John D. Appleby, Chief Zone Officer, and William Hayward, United States Attorney for the Southern District of New York.

*Stipulation Amending Bill of Complaint.*

It is stipulated by and between the United States Attorney and the solicitors for the complainant herein, that the Fifteenth Article of the bill of complaint herein be amended by adding at the end of the said article, the following:

"In pursuance of said rulings and instructions, as the complainant is informed and believes, the United States Attorney purposes and threatens to enforce against the complainant, its agents and servants, penalties, forfeitures and seizures under the National Prohibition Act and to prosecute the complainant, its agents and servants thereunder, by reason of sales to passengers of liquor carried as  
46 & 47 sea stores which have been made by the complainant, its agents and servants on the high seas and in foreign ports in reliance on the rulings of the Treasury Department now and heretofore in force, copies of which are hereto annexed."

Dated, October —, 1922.

WM. HAYWARD,

*United States Attorney.*

KIRLIN, WOOLSEY, CAMPBELL, HICKOX  
& KEATING,

*Solicitors for Complainant.*

48 [Endorsed:] In Equity, 25-7. United States District Court, Southern District of New York. International Mercantile Marine Company, Complainant, vs. H. C. Stuart, etc., et al. Stipulation Amending Bill of Complaint. Kirlin, Woolsey, Campbell, Hickox & Keating, Solicitors for Complainant, 27 William Street, New York, N. Y.

49 United States District Court, Southern District of New York.

INTERNATIONAL MERCANTILE MARINE

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York, et al.

UNITED AMERICAN LINES

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York, et al.

Appearances:

Cletus Keating, Esq., and John —. Woolsey, Esq., for International Mercantile Marine.

Reid L. Carr, Esq., for United American Lines.

William Hayward, Esq., United States Attorney, and John Holley Clark, Esq., Assistant United States Attorney, for Defendants.

LEARNED HAND, *D. J.*:

The plaintiffs (the American Lines) have now amended their bills so as to allege that the District Attorney for the Southern District of New York has threatened to prosecute them for sales made on ship-board at sea upon ships of American registry. Therefore the question is raised which I declined to consider in my original opinion and its decision has become necessary.

50 The question so raised is altogether different from that discussed before. No difficulty arises from the character of the act itself. The plaintiffs sell liquors on the high seas, or dispense them to passengers. The only question is of the place where this occurs, i. e., on board a ship of American registry outside the boundaries of the United States. Is that a place covered by the Eighteenth Amendment? I may in the first place lay aside any question of Congressional intent. Section three alone would have been enough, as I have already interpreted it, to cover all places where the Amendment could operate. However, I am not left in this matter to Section three alone; Section three of the Supplemental Act passed November 3, 1921, leaves no doubt of the intent of Congress. By this it was enacted that the original Act should "apply not only to the United States but to all territory subject to its jurisdiction," almost exactly the words\* used in the Amendment itself. Whatever doubt there might be,—and it seems to me that there was none—of the meaning of the original Act, it is certainly laid by this Section of the latter.

It is, however, argued that there is no provision in the Prohibition Enforcement Act under which sales at sea could be prosecuted. The

\*The Amendment reads, "the jurisdiction thereof."

penalties for sales of liquors are provided in Section twenty-nine of the Act, and are general in their character. They do not specify where the prosecution shall take place or any of its procedure. This is quite natural, since all such matters are provided for in the statutes of the United States. By Revised Statutes, Section 730, it is enacted that "the trial of all offenses committed on the high seas \* \* \* shall be in the district where the offender is found or into which he is first brought." On its face this would cover a sale of liquor upon a ship at sea, if that were in fact a crime. I can see no reason to limit its scope to crimes such as are created by Chapter thirteen of the Criminal Code and are there described as crimes on the high seas. If congress, having power to make an act done at sea criminal, does so, it is none the less a crime committed at sea, because it is not described as such. And so there seems to me nothing in this point, once it appears that the purpose was to make all sections of the act apply as generally as the Amendment allowed.

Therefore, the question becomes a straight interpretation of the Amendment itself. Does it cover American ships on the high seas? The plaintiffs argue that nothing is specified as to ships, that it is only by a fiction (and that too one which does not universally apply)

that an American ship may be called a part of the territory of the United States, that in dealing with Section three of Article four of the Constitution, the word, "territory" has been defined as "lands" and that the limitations upon the power of Congress have been held not to apply to territories until they have been extended by Congress, *Downes v. Bidwell*, 182 U. S. 244, 278, *Dorr v. U. S.* 185 U. S. 138, *Hawaii v. Mankichi*, 190 U. S. 197.

It is quite true that the Amendment does not mention ships; nor does it mention waters, or islands. But a constitution is not a deed; its intent is not exhausted by its details, but incorporated in its objects. The question is not what it specified, but what it wills. It is also true that it is a fiction to call a ship a part of the territory of the flag State, although for some purposes it is so treated.\* But as Lord Blackburn said in *Reg. v. Anderson*, L. R. 1 Crown Cas. Res. 161,

169, it has been called such in countless cases, and that is important when one is interpreting legal words, because though fictions may be only the disguises of the law before logic, they are parts of its wardrobe for all that. While it may be,—and I expect it is—only a coincidence that a ship conventionally falls within the words so used in the Amendment, it is therefore no answer to argue that it does so through a legal fiction.

\**Oppenheim* (International Law Vol. I "Peace" Sec. 172), says "merchantment on the high seas are for some points treated as though they were floating parts of the territory of the State under whose flag they legitimately sail." Again, in more specific language, (Sec. 264), "Private vessels are only considered as though they were floating portions of the flag State in so far as they remain whilst on the open sea in principle under the exclusive jurisdiction of the flag State. Thus the birth of a child, a will or business contract made or a crime committed on board ship, and the like, are considered as happening on the territory, and therefore under the territorial supremacy of the flag State. But although they appear in this respect as though they were, private vessels are in fact not floating portions of the flag State."

Second, the plaintiffs overpress a chance phrase in *U. S. v. Gratiot*, 14 Pet. 526, 537. In speaking of Section three of Article four Thompson, J. said that "territory" was "equivalent to lands," hence the plaintiffs believe that "territory" in other parts of the Constitution can only mean lands. Indeed, "lands" might properly enough include waters, and if it did not, the reasoning would deprive the United State of jurisdiction over the bays and waters of Alaska, for example. However, I do not wish to rest on any such verbal dialectic. It is of course fair to construe the Constitution as a whole and by cross-reference; yet the same word need not always mean the same thing. The Eighteenth Amendment certainly includes under "territory subject to the jurisdiction" of the United States all the "territory" covered by Section three of Article four, but it may include more as well. It was, I think, equivalent to the phrase, "territorial jurisdiction," and it is not unlikely that the currency of that phrase

54 Thirteenth Amendment, a chance in which I cannot see any significance.

Either phrase means to include all subjects of the State's power and the verbal difficulties touching ships arise, I suspect, from a confusion which goes deeper than at once appears. According to modern notions the jurisdiction, i. e. the power to do as it wills, of a State, is limited by geographical boundaries. But it has been so only recently; until at least the Sixteenth Century sovereignty was personal, and allegiance was the basis of what we should now call jurisdiction. The seas admit of no boundaries; they are free to all and upon them territorial jurisdiction is anomalous. Yet a ship has by a curious persistence retained from very ancient times a fictitious personality, more perhaps in our law than elsewhere. *The China*, 7 Wall. 53, *The Barnstable*, 181 U. S. 464, 467, 468, *The Eugene F. Moran*, 212 U. S. 466, 474.

To attribute, therefore, a fictitious personal allegiance to a ship was natural, and such in effect she has, even to the extent of subjecting to jurisdiction the nationals of another State, in *re. Rose*, 140 U. S. 453. It was equally natural, nevertheless, for the law to insist upon its more modern territorial category, so as to hold its old wine in

55 new bottles, and to keep that face of consistency which is so important to its prestige. This I believe may be the reason for the fiction which the plaintiffs decry, and this makes it proper to include within such phrases as these a subject of power which cannot with any propriety be classified territorially.

Nor does the plaintiff's final argument fare better. Cases like *Downes vs. Bidwell*, *supra*, *Dorr v. U. S.*, *supra*, *Hawaii v. Mankichi*, *supra*, have no application. They dealt with limitations on a delegated power of Congress, which it must extend to the territories before it will apply. In *re. Ross*, *supra*, was like them; it dealt with the right of trial by jury in a consular court. But the Eighteenth Amendment is not limitation upon the powers of Congress; it is not even a new power conferred. It is a "police" regulation, emanating directly from the sovereign legislating in person and not by deputy. As such it is self-executory, *qua prohibition*, (National Prohibition

Cases, 253 U. S. 350, 386 "Sixth Conclusion") and needs no extension by Congress. For its effective enforcement statutes must indeed be passed, but it extends to what it covers *ex proprio vigore*.

However, the form of the Amendment answers the argument. In 1920 the United States had all been organized into States and "territory" which meant something could only mean possessions acquired by conquest or purchase. To these the Amendment  
56 extended by its own terms, and the question can only be what those terms mean. If they include ships of American registry, these are within it by the very language; if they do not, Congress cannot extend it to them. Ships are not in a third class, but perhaps the easiest answer is that if Congress must act, it has acted, as I have already said. Nor is the exemption of the Canal Zone material. Congress has indeed shown that it supposed it could exclude certain transportation from the Amendment and perhaps Congress is right. Even so, no inference can be made that it thought the Amendment did not apply before it had acted, and if it could, with all deference the supposition would be an error.

*Scharrenberg v. Dollar S. S. Co.* 245 U. S. 122, seems indeed a case for the plaintiffs, and so it is, if some of the language be read without care. But in that case while the statute considered was as broad as the Amendment, the facts were quite different. The question was whether the ship had assisted in the migration or importation into the United States of a contract laborer, that is of a person who was to "perform labor in this country." The court held first that a seaman was not a laborer, and second, that on a ship he was not employed to "perform labor in this country." Now clearly "this country" is a different phrase from "territory subject to the jurisdiction of the United States." Granting that when he was assisted to sign on, he was "imported into" the United States, a very doubtful concession at best, he was certainly not laboring in the country when he helped work the ship. The language of Mr. Justice Clarke on page 127, on which so much stress is put, is carefully guarded; it says only that a ship is not territory in the sense of that statute, especially agreeing that for purposes of jurisdiction it often is. No argument can be drawn from so limited a statute to a comprehensive amendment such as that at bar.

57 So much then for verbal discussion. The natural meaning of the words includes all subjects over which the United States has jurisdiction. As for implications, I need add nothing to what I have already said in my first opinion. It would be a curious thing if a country professing under its fundamental law to forbid the use of intoxicants were to allow them without stint upon ships that sailed under its flag. The only distinction pressed is the disastrous consequences to an American merchant marine if of all ships at sea ours alone are within this ban. In the first place, the discrimination applies only to passenger vessels, which are a small part of any merchant marine. The whole argument is, however, misconceived. The Eighteenth Amendment involved the destruction at a blow of property values far greater than that of the whole

58 passenger fleet. The motives which directed it disregarded ordinary commercial interests; it was a reform based upon the belief that the use of alcohol was one of the great evils of modern life, against whose utter extirpation no present rights of property might stand. (National Prohibition Cases, supra, Tenth Conclusion.) And while a merchant marine may be thought to have a national importance quite independent of the property involved in it, a court may not imply exceptions in the language of a constitution based upon its estimate of the relative advantages of what it will realize and what it will destroy.

I conclude therefore that a ship of American registry at sea or within a foreign port is within the scope of the Amendment and of Section three, and that the bills must be dismissed. The International Mercantile Marine sails from the port of Antwerp. By Belgian law a certain ration of wine is prescribed for all passengers, without which clearance will be denied. Pending the appeal and in addition to the stays given in the other cases, the District Attorney will be stayed from undertaking any prosecution against that plaintiff because of compliance with the Belgian law in that regard. This does not apply to east bound voyages. I see no reason why the bond should be larger on this account, but I will hear the District Attorney on that point if he wishes.

Bill dismissed with costs; injunctions as stated pending  
59 appeals. Settle orders on notice.

October 26, 1922.

— — —  
D. J.

60 United States District Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE  
(HENDERSON BROTHERS, LTD.),

against

ANDREW W. MELLON, Secretary of the Treasury of the United States,  
et al.

And Ten Other Cases.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decrees upon the answers. The pleadings have been so drawn on both sides as to raise the merits of the controversy, and it is not necessary to set them forth in detail.

The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and liquors as part of their sea-stores. This was done with the consent

of the public authorities who promulgated regulations recognizing the practise, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an opinion

at that time given by the Attorney General, was that, as part of the ship's stores, these wines and liquors, if sealed and kept on board, were not to be regarded as brought within the country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where the peace of the sovereign is at stake. Later the permission so given was further extended to allow the ships to dispense to their crews the customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of *Grogan v. Walker*, and *Anchor Line v. Aldridge*, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration, on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying in and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed to execute the law in accordance with this opinion, and this created the situation out of which these bills arise.

The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in Europe so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal, and carried out again, only for the entertainment of passengers embarking from the United States. Besides the wines and liquors so used the steamers carry a stock for the use of their crews. In

the case of the French, Italian and Belgian ships the law of their flag requires them to supply a ration of wine and in those cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore, the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign lines; they have freely sold their wines and liquors at sea and brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some cases the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the



Zone Officer, but the Collector of the Port of New York and the local Prohibition Director are defendants in all.

#### Appearances:

Hon. Van Vechten Veeder, for Oceanic Steam Navigation Co., Ltd., Liverpool, Brazil & River Plate Steam Navigation Co., Ltd. United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., The Netherlands American Steamship Co. (Holland America Line) and Pacific Steam Navigation Company.

Lucius H. Beers, Esq., for The Cunard Steamship Co., Ltd., and Anchor Line (Henderson Brothers).

Joseph P. Nolan, Esq., for Compagnie Generale Transatlantique.

Reid L. Carr for United American Lines, et al.

Cletus Keating, Esq., and John M. Woolsey, Esq. for International Mercantile Marine—Int. Nav. Co. Ltd.

William Hayward, Esq., United States Attorney, and John Holley Clark, Esq., Asst. U. S. Attorney, for Defendants in all cases.

#### 63 LEARNED HAND, D. J.:

It is conceded, and indeed could not be disputed, after *Grogan v. Walker* and *Anchor Line v. Aldridge*, decided May 15, 1922, that, had the liquors here in question been a part of the ships' cargo, the bills would not lie. It makes no difference that they were not to be broached while carried within territory of the United States; the carriage would be transportation none the less. But because they are part of the ships' stores, in the sense that that term is generally understood, the plaintiffs argue that they do not fall within the same rule. This argument rests upon two alternative premises, first, that "transportation" involves a place where, and a person to whom, the goods are to be delivered, and second, that a ship's stores have by long custom been treated as a part of the "furniture." *Brough v. Whitmore*, 4 Term R. 206, or "appurtenances," *The Dundee*, 1 Hagg. Adm. 109, of the ship, which do not without particular mention become subject to the municipal law of the ports into which she enters, any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I do not see how that would help the plaintiffs. These liquors are carried for delivery at sea to the passengers and crew, and when so delivered their transportation ends. There appears to me no significant distinction in the fact that the place of delivery is the ship itself. The passengers, and for that matter, the crew, are not the same person as the owner, and if the passage of title or possession has anything to do with the matter, the title to, and possession of, the bottle or the dram, passes when it is handed to its consumer. The carriage within the limits of the Port of New York is a part of a

transit whose purpose from the beginning is that very delivery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to search out and coal at sea friendly cruisers during war, as happened in 1914.



Therefore, I might admit the plaintiff's interpretation of the word, if it were necessary. Nevertheless, it seems to me at best very doubtful whether it carries with it any such limitation. The cases on which the plaintiffs rely come only to this, that the jurisdiction of the United States under the interstate commerce clause does not terminate until delivery after a transit across State lines, *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196, *Rhodes v. Iowa*, 170 U. S. 412, *Louisville & Nashville R. R. v. Cook Brewing Co.*, 223 U. S. 70, *Dan-eiger v. Cooley*, 248 U. S. 319. From this it does not follow that the term, "transportation," as used in this statute, implies delivery to another than the person who carries the liquors. Suppose, for example, a parcel of liquor, made after the Amendment, and carried off to be laid away in a cache. There can be no question, I believe, that two separate crimes would be committed, "manufacture" and "transportation."

Nor does it seem to me that the thirteenth and fourteenth sections of Title II of the Prohibition Act, help the plaintiffs. Under these, carriers are required to mark the consignor's and consignee's names on the outside of all packages. But it does not follow that a regulation like this of one kind of transportation imputes to the word itself any of the conditions which it enacts. In common use to transport means to carry about, and I see no reason why it should mean less in Section three. The law clearly intended by immobilizing liquor to make surreptitious traffic in it impossible and its policy  
65 would as well cover movements which might be incidental to, as those which immediately terminated in, a delivery to someone else. The case of *Street v. Lincoln Safe Deposit Company*, 254 U. S. 88, did not decide anything to the contrary; it turned upon the fact that the possession of the liquor in the leased room and in the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as *Street* had, for the possession of the liquor. I conclude therefore that the carriage in question is "transportation."

The first point being thus disposed of, I come to the second. It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they must be manifested and may not be excessive in quantity, as such they are not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbids generally the transportation of liquors, it must be read in the light of this statute and the long usage under it, and that what is not

66 within the United States for the purposes of customs ought not to be so for purposes of prohibition. In addition they urge that under the maritime law it is held that for most purposes sea-stores will be treated as a part of the ship herself. If she is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and least of all a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to these, *Brown v. Duchesne*, 19 How. 183, *Taylor v. U. S.*, 207 U. S. 120, *Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122. Nevertheless, everyone must agree that the question is no more than one of interpretation, for in the cases at bar Congress certainly might, if it chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

*Grogan v. Walker*, *supra*, and *Anchor Line v. Aldridge*, *supra*, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thorough-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the Amendment, and its very want of particularity is a good index

67 that it meant to cover what it could. For this reason it is to be distinguished from earlier local acts of the same kind, as for example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful, since in form it only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the policy, and not the promise, of the nation. It is true that the custom in

maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty. I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

68 However, the motives for positively assuming that such stores must be considered as included within Section three appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legislative motives is speculative, but that vice, if it be one, is of the plaintiffs' making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitations on that meaning, because of the supposed intent of Congress. Since, therefore, I am asked to have recourse to implications, I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises.

In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan v. Walker*, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the law runs for all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of  
69 the stocks are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued

that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question; it must be enough for him that each is forbidden.

70 It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the section covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crews' rations stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later.

Cases like *Brown v. Duchesne*, *supra*, *Taylor v. U. S.*, *supra*, and *Scharrenberg v. U. S.*, *supra*, are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves  
71 from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning of Sec. 3 accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is *sui generis*, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages. It is true that the prayers for relief do include so much,

but prayers without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs than anything I may think about the law. The power under

72 the Seventy-fourth Rule to grant such an order is undoubtedly, notwithstanding a dismissal of the bill, *Merrimac River Savings Bank v. City of Clay Center*, 219 U. S. 527, *Staffords v. King*, 90 Fed. R. 136, (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he holds his decree. Like all such matters, it depends upon a balance between the two, and I must now assume that the chances of success are not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some nicety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far as the loss of the liquors themselves is concerned the damage cannot be said to be irreparable. These must be condemned before they can be forfeited, and in the present state of the calendars the cases at bar will be finally determined long before such libels can be tried. If I am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the long acquiescence of the authorities in the practices here in question will moderate the ultimate penalty of confiscation; I must assume that the plaintiffs will

73 receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as a part of the crew's ration. If the ration is cut off, some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages to stay the enforcement of the law against stocks of wine and liquor necessary

for crew's rations, if, honestly kept and dispensed for that purpose alone.

As to the maintenance of passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing inter se and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is easy to say, if one does not take seriously the opinion behind the Amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury which no judge has the right 74 & 75 to ignore. The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is.

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge, the plaintiffs have no case. Therefore I will go no further than to issue an injunction against interfering with the carriage of a stock necessary for the crews' rations on the east-bound voyage. The plaintiffs must each give a bond in the sum of twenty-five thousand dollars, conditional against the use of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal if the same be taken at once. Settle orders on notice.

October 23, 1922.

— — — — —  
D. J.

76 [Endorsed:] United States District Court, Southern District of New York. Opinion, Learned Hand, D. J.

77 At a Stated Term of the District Court of the United States for the Southern District of New York Held in the Court Rooms Thereof, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 30 Day of October, 1922.

Present: Honorable Learned Hand, District Judge.



## In Equity.

INTERNATIONAL MERCANTILE MARINE COMPANY, Complainant,  
against

H. C. STUART, Acting Collector of Customs for the Port of New York;  
Ralph A. Day, Federal Prohibition Director for the State of New  
York; John D. Appleby, Chief Zone Officer, and William Hay-  
ward, United States Attorney for the Southern District of New  
York, Defendants.

*Final Decree.*

This cause came on to be heard at this term upon motions by the defendants to dismiss the amended bill of complaint, and by the plaintiffs for a final decree in their favor on the pleadings, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the amended bill of  
78 complaint herein be dismissed and defendants have judgment  
against the complainant for their costs to be taxed, and it is  
further

Ordered, adjudged and decreed that until final hearing of this  
cause in the Supreme Court of the United States, and the entry of an  
order or decree on the mandate of that Court, the defendants, their  
servants, agents and subordinates, be and they hereby are stayed and  
restrained from seizing or interfering with the sale, possession or car-  
riage on the complainant's vessels of any and all intoxicating bev-  
erages kept on board as sea stores as required by Belgian or other  
foreign law on vessels sailing from Belgian or other foreign ports to  
ports of the United States; and that the United States Attorney be,  
and he hereby is stayed and restrained from commencing any prose-  
cution against complainants, its officers, agents and/or servants, in-  
cluding the masters and officers of the complainant's vessels; and that  
the Acting Collector of the Port be and he hereby is stayed and re-  
strained from interfering in any way with the entrance and clearance  
of the vessels of the complainant with such intoxicating beverages  
on board, kept on board as sea stores, provided, however, that this  
stay shall go into effect only when the complainant shall have filed  
a bond in the penal sum of \$25,000 conditioned against the gift, is-  
suanee or sale of such intoxicating beverages by the com-

79 & 80 plainant, its officers, agents, servants and the masters and  
officers of its vessels, otherwise than as rations of passengers  
and crews on the westbound voyages of the complainant's vessels, and  
it is further

Ordered, adjudged and decreed that if the complainant herein  
shall fail to take an appeal herein to the Supreme Court of the United  
States within five days from the entry hereof, or to move for prefer-  
ence on the first motion day of the Supreme Court, the defendants  
may move herein to vacate the injunction granted above.

LEARNED HAND,

U. S. D. J.

81 [Endorsed:] United States District Court, Southern Dist. of N. Y. International Mercantile Marine Company, Complainant, against H. C. Stuart, Acting Collector, etc., et al., Defendants. Final Decree. Kirlin, Woolsey, Campbell, Hickox & Keating, Solicitors for Complainant, 27 William Street, New York, N. Y.

82 United States District Court, Southern District of New York.

In Equity.

E. 25-7.

INTERNATIONAL MERCANTILE MARINE COMPANY, Complainant,  
against

H. C. STUART, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York; John D. Appleby, Chief Zone Officer, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

The above-named complainant conceiving itself aggrieved by a decree made and entered on the 31st day of October, 1922, in the above-entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith and it prays that this appeal may be allowed and that the transcript of record, pleadings and papers upon which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX  
& KEATING, *Solicitors for Complainant.*

The foregoing claim for appeal is allowed.

LEARNED HAND,  
*United States District Judge for  
Southern District of New York.*

83 United States District Court, Southern District of New York.

In Equity.

E. 25-7.

INTERNATIONAL MERCANTILE MARINE COMPANY, Complainant,  
against

H. C. STUART, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York; John D. Appleby, Chief Zone Officer, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

The complainant hereby assigns error in the final judgment or decree of the District Court herein, entered on October 31, 1922, in the following respects:



First. The Court erred in dismissing the bill of complaint herein.

Second. The Court erred in denying the petition for an injunction.

Third. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States prohibits a vessel of the United States from keeping on board while in the territorial waters of the United States intoxicating liquors constituting  
84 part of the customary sea stores of such ship, lawfully acquired by it in a foreign jurisdiction and on board solely for the use and consumption thereof on board said ship outside the jurisdiction of the United States.

Fourth. The Court erred in holding that the National Prohibition Act and the Supplemental Act of November 23, 1921, prohibit a vessel of the United States from keeping on board while in the territorial waters of the United States, intoxicating liquors constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States, the National Prohibition Act and the Supplemental Act of November 25, 1921, prohibit a vessel of the United States from having on board as sea stores while on the territorial waters of the United States, such intoxicating beverages as are required for passengers as part of their customary rations by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

85 Sixth. The Court erred in holding that the keeping on board of complainants' vessel of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the third, fourth and fifth assignments of error, constitutes a transportation of the same within the prohibition of the Eighteenth Amendment, the National Prohibition Act and the Supplemental Act of November 23, 1921.

Seventh. The Court erred in holding that possession within the territorial waters of the United States of intoxicating beverages in the circumstances mentioned in the third, fourth and fifth assignments of error is prohibited by the Eighteenth Amendment to the Constitution of the United States, the National Prohibition Act and the Supplemental Act of November 23, 1921.

Eighth. The Court erred in refusing to hold that the interpretation of the National Prohibition Act and the Supplemental Act of November 23, 1921, mentioned in the third, fourth, fifth and seventh assignments of error, was unconstitutional and invalid and not within the powers conferred by Congress by the Constitution.

86 Ninth. The Court erred in holding that a vessel of the United States is territory within the meaning of the Eighteenth Amendment to the Constitution.

Tenth. The Court erred in holding that a vessel of the United States is territory within the meaning of the National Prohibition Act and the Supplemental Act of November 23, 1921.

Eleventh. The Court erred in holding that a vessel of the United States, having on board intoxicating liquors lawfully acquired in foreign ports and constituting part of the customary sea stores of such a ship, could not sell such liquors upon the high seas and in foreign ports.

Twelfth. The Court erred in holding that the National Prohibition Act contains provisions for the prosecution of persons selling on board a vessel of the United States on the high seas, intoxicating liquors lawfully acquire in foreign ports and forming part of the customary sea stores of a vessel of the United States.

Thirteenth. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States covered vessels of the United States on the high seas or in foreign ports.

Fourteenth. The Court erred in holding that an American vessel at sea or within a foreign port is within the scope of the Eighteenth Amendment, the National Prohibition Act, or the Supplemental Act of November 23, 1921.

87 Fifteenth. The Court erred in holding that the sale on board of complainants' vessels while on the high seas or in foreign ports, of intoxicating liquors lawfully acquired in foreign ports and forming part of the customary sea stores of such vessels, constitutes sale of the same within the prohibition of the Eighteenth Amendment, the National Prohibition Act and the Supplemental Act of November 23, 1921.

Sixteenth. That the National Prohibition Act and the Supplemental Act of November 23, 1921, as construed and applied by the District Court, are unconstitutional and void because enforcement thereof with respect to sea stores on complainants' vessels would deprive the complainants of its property and subject it to penalties without due process of law.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX &  
KEATING,

*Solicitors for Complainant.*

88 District Court of the United States of America for the Southern District of New York, in the Second Circuit.

In Equity.

25-7.

INTERNATIONAL MERCANTILE MARINE COMPANY, Complainant-Appellant,  
against

H. C. STUART, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York; John D. Appleby, Chief Zone Officer, and William Hayward, United States Attorney for the Southern District of New York, Defendants, Respondents.

Know all men by these presents, That National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, is held and firmly bound unto the above named H. C. Stuart, Acting Collector of Customs for the Port of New York, Ralph A. Day, Federal Prohibition Director for the State of New York, John D. Appleby, Chief Zone Officer and William Hayward, United States Attorney for the Southern District of New York, in the sum of Two Hundred and Fifty (\$250.00) Dollars, to be paid to the said H. C. Stuart, Acting Collector of Customs for the Port of New York, Ralph A. Day, Federal Prohibition Director for the State of New York, John D. Appleby, Chief Zone Officer and William Hayward, United States Attorney for the Southern District of New York, for the payment of which well and truly to be made, said National Surety Company binds itself, its successors and assigns, firmly by these presents.

Sealed and dated the 31st day of October, 1922.

Whereas, the above named International Mercantile Marine Company, Appellant, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered  
89 in said cause in the District Court of the United States for the Southern District of New York on the 31st day of October, 1922.

Now, therefore, the condition of this obligation is such, That if the above named International Mercantile Marine Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NATIONAL SURETY COMPANY,  
By ROBERT M. NUGENT,  
*Resident Vice President.*

Attest:

N. V. TYNAN,  
*Resident Asst. Secretary.*

90 &amp; 91

National Surety Company.

Capital, \$5,000,000.00.

*Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK.

County of New York, ss:

On this 31st day of October one thousand nine hundred and twenty-two before me personally came Robert M. Nugent, known to me to be the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of International Mercantile Marine Company as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of International Mercantile Marine Company is the corporate seal of said National Surety Company, and was thereto affixed by the order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with N. V. Tynan and knows him to be the Resident Assistant Secretary of said Company; that the signature of said N. V. Tynan subscribed to said Bond is in the genuine handwriting of said N. V. Tynan, and was thereto subscribed by order and authority of said Board of Directors; and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Ten Million (\$10,000,000) Dollars.

That — is the agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

ROBERT M. NUGENT.  
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 31st day of October, 1922.

H. E. EMMETT,  
Notary Public.  
(Officer's Signature, description and Seal.)

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[Endorsed.]

The within bond is hereby approved.

LEARNED HAND,  
U. S. D. J.

October 31, 1922.

*Citation on Appeal.*

By the Honorable Learned Hand, one of the United States District Judges for the Southern District of New York, in the Second Circuit, to H. C. Stuart, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York; John D. Appleby, Chief Zone Officer, and William Hayward, United States Attorney for the Southern District of New York, Greeting:

You are hereby cited and admonished to be and appear before a United States Supreme Court, to be holden at the City of Washington, District of Columbia on the 6th day of December 1922, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein International Mercantile Marine Company is complainant and you are defendants, to show cause, if any there be, why the decree in said cause mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 31st day of October, in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

## LEARNED HAND,

*United States District Judge for the Southern District  
of New York, in the Second Circuit.*

94 [Endorsed:] E. 25-7. United States Supreme Court. International Mercantile Marine Co. vs. H. C. Stuart, Acting Collector of Customs, etc. et al. Citation. Kirlin, Woolsey, Campbell, Hickox & Keating, Attorney- for complainant, 27 William Street, Borough of Manhattan, City of New York.

95 United States District Court, Southern District of New York.

INTERNATIONAL MERCANTILE MARINE COMPANY, Complainant,  
against

H. C. STUART, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York; John D. Appleby, Chief Zone Officer, and William Hayward, United States Attorney for the Southern District of New York.

It is hereby stipulated and agreed by and between the solicitors for the respective parties hereto that the foregoing documents may constitute the record in the above entitled cause, as agreed upon by the parties, to be filed with the Clerk of the Supreme Court of the United States, and that the Clerk of the United States District Court for

the Southern District of New York may certify the same to the Clerk of the Supreme Court of the United States as such record.

Dated, New York, November 9, 1922.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX &  
KEATING,

*Solicitors for Complainant.*

WM. HAYWARD,

*U. S. Atty., Solicitor for Defendants.*

96 United States District Court, Southern District of New York.

E. 25-7.

INTERNATIONAL MERCANTILE MARINE COMPANY, Complainant,  
against

H. C. STUART, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York; John D. Appleby, Chief Zone Officer, and William Hayward, United States Attorney for the Southern District of New York.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

In testimony whereof I have caused the seal of the said District Court to be hereunto affixed at the City of New York in the Southern District of New York this 9th day of November, in the year of our ord the one thousand *nineteen* hundred and twenty-second and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX GILCHRIST, JR.,  
*Clerk.*

Endorsed on cover: File No. 29,243. S. New York D. C. U. S. Term No. 693. International Mercantile Marine Company, appellant, vs. H. C. Stuart, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York; John D. Appleby, Chief Zone Officer, et al. Filed November 10th, 1922. File No. 29,243.

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## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 694.

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UNITED AMERICAN LINES, INCORPORATED; ATLANTIC  
MAIL CORPORATION, AMERICAN SHIP & COMMERCE  
NAVIGATION CORPORATION, *ET AL.*, APPELLANTS,

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*vs.*

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HENRY C. STUART, ACTING COLLECTOR OF CUSTOMS  
FOR THE PORT OF NEW YORK; JOHN D. APPLEBY,  
FEDERAL PROHIBITION ZONE CHIEF FOR THE  
STATES OF NEW YORK AND NEW JERSEY, AND WIL-  
LIAM HAYWARD, UNITED STATES ATTORNEY FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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FILED NOVEMBER 19, 1922.

(39,244)



(29,244)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 694.

UNITED AMERICAN LINES, INCORPORATED; ATLANTIC  
MAIL CORPORATION, AMERICAN SHIP & COMMERCE  
NAVIGATION CORPORATION, *ET AL.*, APPELLANTS,

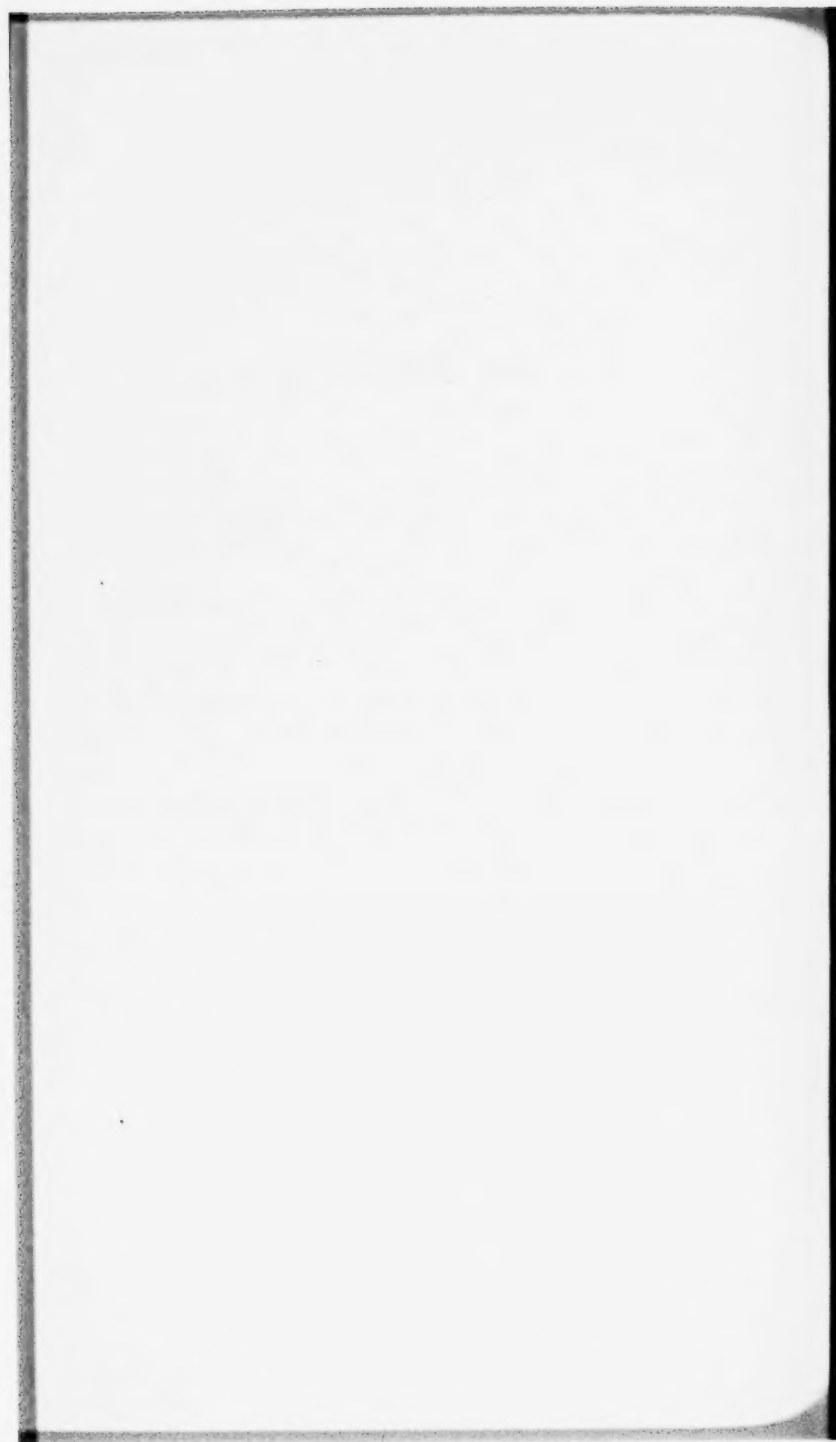
*vs.*

HENRY C. STUART, ACTING COLLECTOR OF CUSTOMS  
FOR THE PORT OF NEW YORK; JOHN D. APPLEBY,  
FEDERAL PROHIBITION ZONE CHIEF FOR THE  
STATES OF NEW YORK AND NEW JERSEY, AND WIL-  
LIAM HAYWARD, UNITED STATES ATTORNEY FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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1 By the Honorable Learned Hand, One of the United States District Judges for the Southern District of New York, in the Second Circuit, to Henry C. Stuart, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Greeting:

You are hereby cited and admonished to be and appear in The Supreme Court of the United States to be holden at the City of Washington, District of Columbia, within thirty days from the date hereof, pursuant to an appeal allowed and filed in the office of the Clerk of the District Court of the United States for the Southern District of New York, wherein United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, are appellants, and you are appellees, to show cause, if any there be, why the final order and decree in the said appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan in the City of New York, in the District and Circuit above named, this 9th day of November, in the year of our Lord, one thousand nine hundred and twenty two and of the Independence of the United States the one hundred and forty-seventh.

LEARNED HAND,  
*United States District Court Judge for  
the Southern District of New York  
in the Second Circuit.*

4 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants. Citation. Filed November 9, 1922. Alex Gilchrist, Jr., Clerk. Service of a copy of the within Citation is admitted this 9th day of November, 1922. William Hayward, United States Attorney for the Southern District of New York. Clark, Carr & Ellis, 120 Broadway, New York.

5 The District Court of the United States for the Southern District of New York.

In Equity.

Eq. 25-13.

UNITED AMERICAN LINES, INCORPORATED; ATLANTIC MAIL CORPORATION; American Ship and Commerce Navigation Corporation and Shawmut Steamship Company, Complainants,

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Haywood, United States Attorney for the Southern District of New York, Defendants.

*Assignment of Errors.*

Come now the complainants above named, by their solicitors, and respectfully aver and allege that the Honorable the District Court of the United States for the Southern District of New York, erred in the cause foregoing, in the respects following, to-wit:

First. That the Court erred in dismissing the amended bill of complaint herein.

Second. That the Court erred in denying the petition for an injunction.

6 Third. That the Court erred in holding that the Eighteenth Amendment of the Constitution of the United States prohibits a ship of American registry from keeping on board such ship while on the territorial waters of the United States, intoxicating beverage liquors constituting part of the regular sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States.

Fourth. That the Court erred in holding that the National Prohibition Act prohibits a ship of American registry from keeping on board such ship, while on the territorial waters of the United States, intoxicating beverage liquors constituting part of the regular stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States.

Fifth. That the Court erred in holding that the keeping on board a ship of American registry, while on the territorial waters of

United States, of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States, constitutes transportation of such intoxicating beverage liquors within the prohibition of the Eighteenth Amendment of the Constitution of the United States.

Sixth. That the Court erred in holding that the keeping on board a ship of American registry, while on the territorial waters of the United States, of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States, constitutes transportation of such intoxicating beverage liquors within the prohibition of the National Prohibition Act.

Seventh. That the Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverage liquors in the circumstances mentioned in the Third Assignment of Error is prohibited by the Eighteenth Amendment of the Constitution of the United States.

Eighth. That the Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverage liquors in the circumstances mentioned in the Fourth Assignment of Error is prohibited by the National Prohibition Act.

Ninth. That the Court erred in holding that the Eighteenth Amendment of the Constitution of the United States prohibits a ship of American registry from keeping on board such ship, while upon the high seas and in foreign ports and outside the territorial waters of the United States, intoxicating beverage liquors constituting part of the regular sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States.

Tenth. That the Court erred in holding that the National Prohibition Act prohibits a ship of American registry from keeping on board such ship, while upon the high seas and in foreign ports and outside the territorial waters of the United States, intoxicating beverage liquors constituting part of the regular sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States.

Eleventh. That the Court erred in holding that the keeping on board a ship of American registry, while upon the high seas and in foreign ports and outside the territorial waters of the United States, of

intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States, constitutes transportation

9       tion of such intoxicating beverage liquors within the prohibition of the Eighteenth Amendment of the Constitution of the United States.

Twelfth. That the Court erred in holding that the keeping on board a ship of American registry, while upon the high seas and in foreign ports and outside the territorial waters of the United States, of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States, constitutes transportation of such intoxicating beverage liquors within the prohibition of the National Prohibition Act.

Thirteenth. That the Court erred in holding that the possession upon the high seas and in foreign ports and outside the territorial waters of the United States of intoxicating beverage liquors in the circumstances mentioned in the Eleventh Assignment of Error is prohibited by the Eighteenth Amendment of the Constitution of the United States.

Fourteenth. That the Court erred in holding that the possession upon the high seas and in foreign ports and outside the territorial waters of the United States of intoxicating beverage liquors in the circumstances mentioned in the Twelfth Assignment of Error is prohibited by the National Prohibition Act.

10       Fifteenth. That the Court erred in holding that the Eighteenth Amendment of the Constitution of the United States prohibits the sale of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired in a foreign jurisdiction, on board a ship of American registry upon the high seas and outside the territorial waters of the United States.

Sixteenth. That the Court erred in holding that the National Prohibition Act prohibits the sale of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired in a foreign jurisdiction, on board a ship of American registry upon the high seas and outside the territorial waters of the United States.

Seventeenth. That the Court erred in holding that the Eighteenth Amendment of the Constitution of the United States prohibits the sale of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired in a foreign jurisdiction, on board a ship of American registry in foreign ports and in the territorial waters of foreign nations.

Eighteenth. That the Court erred in holding that the National Prohibition Act prohibits the sale of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired in a foreign jurisdiction, on board a ship of American registry in foreign ports and in the territorial waters of foreign nations.

Nineteenth. The National Prohibition Act as construed and applied by the District Court of the United States for the Southern District of New York is unconstitutional and void because enforcement thereof would deprive the complainants of their property and subject the complainants to penalties without due process of law.

Wherefore, complainants pray that the said final order and decree of the District Court of the United States for the Southern District of New York be in all things reversed, for naught held and set aside, and that an injunction be granted the complainants as prayed for in their amended bill of complaint herein, and for such other and further relief as to the Court may seem just and proper.

CLARK, CARR & ELLIS,

*Solicitors for Complainants.*

13 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York, et al., Defendants. Assignment of Errors. Filed November 9th, 1922. Alex Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York, Solicitors for Complainants.

14 & 15 The District Court of the United States for the Southern District of New York.

In Equity.

Eq. 25-13.

UNITED AMERICAN LINES, INCORPORATED, ATLANTIC MAIL CORPORATION, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants,

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

*Order Allowing Appeal.*

On motion of Reid L. Carr, Esq., of solicitors for complainants in the above entitled cause, it is hereby

Ordered that an appeal to The Supreme Court of the United States from the final order and decree heretofore filed and entered herein be, and the same is hereby allowed, and that a transcript of the record, proceedings and papers upon which said final order and decree was made be forthwith transmitted to said The Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of Two Hundred and Fifty Dollars (\$250.00), the same to act as a bond for costs.

Dated, New York City, November 9, 1922.

LEARNED HAND,

*District Judge.*

16 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York, et al., Defendants. Order Allowing Appeal. Filed November 9th, 1922. Alex Gilchrist, Jr., Clerk. Clark Carr & Ellis, 120 Broadway, New York, Solicitors for Complainants.

17 The District Court of the United States for the Southern District of New York.

In Equity.

Eq. 25-13.

UNITED AMERICAN LINES, INCORPORATED, ATLANTIC MAIL CORPORATION, AMERICAN SHIP AND COMMERCE NAVIGATION CORPORATION, and Shawmut Steamship Company, Complainants,

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

*Petition for Appeal.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The above named, United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, corporations, complainants in the cause above entitled, conceiving themselves aggrieved by the final order and decree rendered and entered in the above entitled



cause, on the 30th day of October, 1922, do hereby severally appeal from said final order and decree, to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herewith, and they respectfully pray that this appeal be allowed 18 & 19 and that citation be issued as provided by law, and that a transcript of the record, proceedings, and papers upon which said final order and decree was made, duly authenticated, be sent to said The Supreme Court of the United States, sitting at the City of Washington, District of Columbia, under the rules of such Court in such cases made and provided.

And your petitioners further pray that the proper order relating to the security to be required of them, be now made.

CLARK, CARR & ELLIS,  
*Solicitors for Complainants.*

20 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York, et al., Defendants. Petition for Appeal. Filed November 9th, 1922. Alex Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York, Solicitors for Complainants.

21 & 22 At a Stated Term of the District Court of the United States for the Southern District of New York Held in the Court Room thereof, at the Post Office Building, Borough of Manhattan, City of New York, on the 30th Day of October, 1922.

Present: Honorable Learned Hand, District Judge.

In Equity.

Eq. 25-13.

UNITED AMERICAN LINES, INCORPORATED, ATLANTIC MAIL CORPORATION, AMERICAN SHIP AND COMMERCE NAVIGATION CORPORATION, and SHAWMUT STEAMSHIP COMPANY, Complainants,

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

*Final Order and Decree.*

This cause came on to be heard at this term upon motions by the defendants to dismiss the amended bill of complaint, and by the complainants for a final decree in their favor on the pleadings, and was

argued by counsel; and thereupon, upon consideration thereof, it was Ordered, adjudged, and decreed that the amended bill of complaint herein be dismissed and defendants have judgment against the complainants for their costs to be taxed.

(Sgd.)

LEARNED HAND,  
*District Judge.*

23 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York, et al., Defendants. Final Order and Decree. Filed October 31, 1922. Alex Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York, Solicitors for Complainants.

24 United States District Court, Southern District of New York.

INTERNATIONAL MERCANTILE MARINE

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York, et al.

UNITED AMERICAN LINES

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York, et al.

Appearances:

Cletus Keating, Esq., and John M. Woolsey, Esq., for International Mercantile Marine.

Reid L. Carr, Esq., for United American Lines.

William Hayward, Esq., United States Attorney, and John Holley Clark, Esq., Assistant United States Attorney, for Defendants.

LEARNED HAND, *D. J.*:

The plaintiffs (the American Lines) have now amended their bills so as to allege that the District Attorney for the Southern District of New York has threatened to prosecute them for sales made on ship-board at sea upon ships of American registry. Therefore the question is raised which I declined to consider in my original opinion and its decision has become necessary.

25 The question so raised is altogether different from that discussed before. No difficulty arises from the character of the act itself. The plaintiffs sell liquors on the high seas, or dispense them to passengers. The only question is of the place where this occurs, i. e., on board a ship of American registry outside the boundaries of the United States. Is that a place covered by the

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Eighteenth Amendment? I may in the first place lay aside any question of Congressional intent. Section three alone would have been enough, as I have already interpreted it, to cover all places where the Amendment could operate. However, I am not left in this matter to Section three alone; Section three of the Supplemental Act passed November 3, 1921, leaves no doubt of the intent of Congress. By this it was enacted that the original Act should "apply not only to the United States but to all territory subject to its jurisdiction," almost exactly the words\* used in the Amendment itself. Whatever doubt there might be,—and it seems to me that there was none—of the meaning of the original Act, it is certainly laid by this Section of the latter.

It is, however, argued that there is no provision in the Prohibition Enforcement Act under which sales at sea could be prosecuted. The penalties for sales of liquors are provided in Section twenty-nine of the Act, and are general in their character. They do not specify where the prosecution shall take place or any of its procedure. This is quite natural, since all such matters are provided for in the statutes of the United States. By Revised Statutes, Section 730, it is enacted that "the trial of all offenses committed on the high seas \* \* \* shall be in the district where the offender is found or into which he is first brought." On its face this would cover a sale of liquor upon a ship at sea, if that were in fact a crime. I can see no reason to limit its scope to crimes such as are created by Chapter thirteen of the Criminal Code and are there described as crimes on the high seas. If congress, having power to make an act done at sea criminal, does so, it is none the less a crime committed at sea, because it is not described as such. And so there seems to me nothing in this point, once it appears that the purpose was to make all sections of the act apply as generally as the Amendment allowed.

Therefore, the question becomes a straight interpretation of the Amendment itself. Does it cover American ships on the high seas? The plaintiffs argue that nothing is specified as to ships, that it is only by a fiction (and that too one which does not universally apply)

that an American ship may be called a part of the territory of the United States, that in dealing with Section three of Article four of the Constitution, the word, "territory" has been defined as "lands" and that the limitations upon the power of Congress have been held not to apply to territories until they have been extended by Congress, *Downes v. Bidwell*, 182 U. S. 244, 278, *Dorr v. U. S.* 185 U. S. 138, *Hawaii v. Mankichi*, 190 U. S. 197.

It is quite true that the Amendment does not mention ships; nor does it mention waters, or islands. But a constitution is not a deed; its intent is not exhausted by its details, but incorporated in its objects. The question is not what it specified, but what it wills. It is also true that it is a fiction to call a ship a part of the territory of the flag State, although for some purposes it is so treated.† But as Lord

\*The Amendment reads, "the jurisdiction thereof."

†Oppenheim (International Law Vol. I "Peace" Sec. 172), says "merchantment on the high seas are for some points treated as though they were floating parts of the territory of the State under whose flag they legitimately sail."

Blackburn said in *Reg. v. Anderson*, L. R. 1 Crown Cas. Res. 161, 169, it has been called such in countless cases, and that is important when one is interpreting legal words, because though fictions may be only the disguises of the law before logic, they are parts of its wardrobe for all that. While it may be,—and I expect it is—only a coincidence that a ship conventionally falls within the words so used in the Amendment, it is therefore no answer to argue that it does so through a legal fiction.

Second, the plaintiffs overpress a chance phrase in *U. S. v. Gratiot*, 14 Pet. 526, 537. In speaking of Section three of Article four Thompson, J. said that "territory" was "equivalent to lands," hence the plaintiffs believe that "territory" in other parts of the Constitution can only mean lands. Indeed, "lands" might properly enough include waters, and if it did not, the reasoning would deprive the United States of jurisdiction over the bays and waters of Alaska, for example. However, I do not wish to rest on any such verbal dialectic. It is of course fair to construe the Constitution as a whole and by cross-reference; yet the same word need not always mean the same thing. The Eighteenth Amendment certainly includes under "territory subject to the jurisdiction" of the United States all the "territory" covered by Section three of Article four, but it may include more as well. It was, I think, equivalent to the phrase, "territorial jurisdiction," and it is not unlikely that the currency of that phrase influenced the substitution of "territory" for "place" in the Thirteenth Amendment, a change in which I cannot see any significance.

Either phrase means to include all subjects of the State's power and the verbal difficulties touching ships arise, I suspect, from a confusion which goes deeper than at once appears. According to modern notions the jurisdiction, i. e. the power to do as it wills, of a State, is limited by geographical boundaries. But it has been so only recently; until at least the Sixteenth Century sovereignty was personal, and allegiance was the basis of what we should now call jurisdiction. The seas admit of no boundaries; they are free to all and upon them territorial jurisdiction is anomalous. Yet a ship has by a curious persistence retained from very ancient times a fictitious personality, more perhaps in our law than elsewhere. *The China*, 7 Wall. 53, *The Barnstable*, 181 U. S. 464, 467, 468, *The Eugene F. Moran*, 212 U. S. 466, 474.

To attribute, therefore, a fictitious personal allegiance to a ship was natural, and such in effect she has, even to the extent of subjecting to jurisdiction the nationals of another State, in *re. Ross*: 140 U. S. 453. It was equally natural, nevertheless, for the law to insist upon

Again, in more specific language, (Sec. 264), "Private vessels are only considered as though they were floating portions of the flag State in so far as they remain whilst on the open sea in principle under the exclusive jurisdiction of the flag State. Thus the birth of a child, a will or business contract made or a crime committed on board ship, and the like, are considered as happening on the territory, and therefore under the territorial supremacy of the flag State. But although they appear in this respect as though they were, private vessels are in fact not floating portions of the flag State."

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is more modern territorial category, so as to hold its old wine in new bottles, and to keep that face of consistency which is so important to its prestige. This I believe may be the reason for the fiction which the plaintiffs decry, and this makes it proper to include within such phrases as these a subject of power which cannot with any propriety be classified territorially.

Nor does the plaintiff's final argument fare better. Cases Like *Downes vs. Bidwell*, supra, *Dorr v. U. S.* supra, *Hawaii v. Mankichi*, supra, have no application. They dealt with limitations on a delegated power of Congress, which it must extend to the territories before it will apply. In *re. Ross*, supra, was like them; it dealt with the right of trial by jury in a consular court. But the Eighteenth Amendment is not a limitation upon the powers of Congress; it is not even a new power conferred. It is a "police" regulation, emanating directly from the sovereign legislating in person and not by deputy. As such it is self-executory, qua prohibition, (National Prohibition Cases, 253 U. S. 350, 386 "Sixth Conclusion") and needs no extension by Congress. For its effective enforcement statutes must indeed be passed, but it extends to what it covers *ex proprio vigore*.

However, the form of the Amendment answers the argument. In 1920 the United States had all been organized into States and "territory" which meant something could only mean possessions acquired by conquest or purchase. To these the Amendment extended by its own terms, and the question can only be what those terms mean. If they include ships of American registry, these are within it by the very language; if they do not, Congress cannot extend it to them. Ships are not in a third class, but perhaps the easiest answer is that if Congress must act, it has acted, as I have already said. Nor is the exemption of the Canal zone material. Congress has indeed shown that it supposed it could exclude certain transportation from the Amendment and perhaps Congress is right. Even so, no inference can be made that it thought the Amendment did not apply before it had acted, and if it could, with all deference the supposition would be an error.

*Scharrenberg v. Dollar S. S. Co.* 245 U. S. 122, seems indeed a case for the plaintiffs, and so it is, if some of the language be read with care. But in that case while the statute considered was as broad as the Amendment, the facts were quite different. The question was whether the ship had assisted in the migration or importation into the United States of a contract laborer, that is of a person who was to "perform labor in this country." The court held first that seaman was not a laborer, and second, that on a ship he was not employed to "perform labor in this country." Now clearly "this country" is a different phrase from "territory subject to the jurisdiction of the United States." Granting that when he was assisted to sign on, he was "imported into" the United States, a very doubtful concession at best, he was certainly not laboring in the country when he helped work the ship. The language of Mr. Justice Clarke on page 127, on which so much stress is put, is carefully guarded; it says only that a ship is not territory in the sense that statute, especially agreeing that for purposes of jurisdiction

it often is. No argument can be drawn from so limited a statute to a comprehensive amendment such as that at bar.

So much then for verbal discussion. The natural meaning of the words includes all subjects over which the United States has jurisdiction. As for implications, I need add nothing to what I have already said in my first opinion. It would be a curious thing if a country professing under its fundamental law to forbid the use of intoxicants were to allow them without stint upon ships that sailed under its flag. The only distinction pressed is the disastrous consequences to an American merchant marine if of all ships at sea ours alone are within this ban. In the first place, the discrimination applies only to passenger vessels, which are a small part of any merchant marine. The whole argument is, however, misconceived. The Eighteenth Amendment involved the destruction at a blow of property values far greater than that of the whole passenger fleet. The motives which directed it disregarded

33 ordinary commercial interests; it was a reform based upon the belief that the use of alcohol was one of the great evils of modern life, against whose utter extirpation no present rights of property might stand. (National Prohibition Cases, *supra*, Tenth Conclusion.) And while a merchant marine may be thought to have a national importance quite independent of the property involved in it, a court may not imply exceptions in the language of a constitution based upon its estimate of the relative advantages of what it will realize and what it will destroy.

I conclude therefore that a ship of American registry at sea or within a foreign port is within the scope of the Amendment and of Section three, and that the bills must be dismissed. The International Mercantile Marine sails from the port of Antwerp. By Belgian law a certain ration of wine is prescribed for all passengers, without which clearance will be denied. Pending the appeal and in addition to the stays given in the other cases, the District Attorney will be stayed from undertaking any prosecution against that plaintiff because of compliance with the Belgian law in that regard. This does not apply to east bound voyages. I see no reason why the bond should be larger on this account, but I will hear the District Attorney on that point if he wishes.

Bill dismissed with costs, injunctions as stated pending  
34 & 35 ing appeals. Settle orders on notice.

October 26, 1922.

— — —  
D. J.

36 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William

Hayward, United States Attorney for the Southern District of New York, Defendants. Opinion. Filed October 26, 1922. Alex Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York.

37 United States District Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE  
(HENDERSON BROTHERS), LTD.,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States,  
et al.

And Ten Other Cases.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decrees upon the answers. The pleadings have been so drawn on both sides as to raise the merits of the controversy, and it is not necessary to set them forth in detail.

The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and liquors as part of their sea-stores. This was done with the consent of the public authorities who promulgated regulations recognizing the practise, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an opinion at that time given by the Attorney General, was that, as part  
38 of the ship's stores, these wines and liquors, if sealed and kept on board, were not to be regarded as brought within the country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where the peace of the sovereign is at stake. Later the permission so given was further extended to allow the ships to dispense to their crews their customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of *Grogan v. Walker*, and *Anchor Line v. Aldridge*, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration, on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying in and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed to execute the law in accordance with this opinion, and this created the situation out of which these bills arise.



The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in Europe so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal, and carried out again, only for the entertainment of passengers embarking from the United States. Besides the wines and liquors so used the steamers carry a stock for the use of their crews. In

the case of the French, Italian and Belgian ships the law of their flag requires them to supply a ration of wine and in those cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore, the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign lines; they have freely sold their wines and liquors at sea and brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some cases the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the Zone Officer, but the Collector of the Port of New York and the local Prohibition Director are defendants in all.

#### Appearances:

Hon. Van Vechten Veeder, for Oceanic Steam Navigation Co., Ltd., Liverpool, Brazil & River Plate Steam Navigation Co., Ltd. United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., The Netherlands American Steamship Co. (Holland America Line) and Pacific Steam Navigation Company.

Lucius H. Beers, Esq., for The Cunard Steamship Co., Ltd., and Anchor Line (Henderson Brothers).

Joseph P. Nolan, Esq., for Compagnie Generale Transatlantique.

Reid L. Carr for United American Lines, et al.

Cleatus Keating, Esq., and John M. Woolsey, Esq., for International Mercantile Marine and International Navigation Co., Ltd.

William Hayward, Esq., United States Attorney, and John Holley Clark, Esq., Assistant U. S. Attorney, for Defendant in all cases.

#### 40 LEARNED HAND, D. J.:

It is conceded, and indeed could not be disputed, after *Grogan v. Walker and Anchor Line v. Aldridge*, decided May 15, 1922, that had the liquors here in question been a part of the ships' cargo, the bills would not lie. It makes no difference that they were not to be broached while carried within territory of the United States:

the carriage are part of the understock rule. The "transportation" of goods are long custom. Whitmore Hagg. Action becomes, and enters, and

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e carriage would be transportation none the less. But because they e part of the ships' stores, in the sense that that term is generally nderstood, the plaintiffs argue that they do not fall within the same le. This argument rests upon two alternative premises, first, that "transportation" involves a place where, and a person to whom, the ods are to be delivered, and second, that a ship's stores have by ng custom been treated as a part of the "furniture," *Brough v. hitmore*, 4 Term R. 206, or "appurtenances," *The Dundee*, 1 gg. Adm. 109, of the ship, which do not without particular men- n become subject to the municipal law of the ports into which she ters, any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I not see how that would help the plaintiffs. These liquors are rried for delivery at sea to the passengers and crew, and when so livered their transportation ends. There appears to me no sig- nificant distinction in the fact that the place of delivery is the ship elf. The passengers, and for that matter, the crew, are not the me person as the owner, and if the passage of title or possession s anything to do with the matter, the title to, and possession of, the ttle or the dram, passes when it is handed to its consumer. The rriage within the limits of the Port of New York is a part of a transit whose purpose from the beginning is that very de- livery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to search out

d coal at sea friendly cruisers during war, as happened in 1914. Therefore, I might admit the plaintiff's interpretation of the word, it were necessary. Nevertheless, it seems to me at best very doubt- whether it carries with it any such limitation. The cases on hich the plaintiffs rely come only to this, that the jurisdiction of e United States under the interstate commerce clause does not minate until delivery after a transit across State lines, *Gloucester rry Co. v. Pa.*, 114 U. S. 196, *Rhodes v. Iowa*, 170 U. S. 412, *Louisville & Nashville R. R. v. Cook Brewing Co.*, 223 U. S. 70, *Dan- er v. Cooley*, 248 U. S. 319. From this it does not follow that the m, "transportation," as used in this statute, implies delivery to oother than the person who carries the liquors. Suppose, for ex- ple, a parcel of liquor, made after the Amendment, and carried to be laid away in a cache. There can be no question, I believe, at two separate crimes would be committed, "manufacture" and nsportation."

Nor does it seem to me that the thirteenth and fourteenth sections Title II of the Prohibition Act, help the plaintiffs. Under these rriers are required to mark the consignor's and consignee's names the outside of all packages. But it does not follow that a regula- n like this of one kind of transportation imputes to the word itself y of the conditions which it enacts. In common use to transport ans to carry about, and I see no reason why it should mean less Section three. The law clearly intended by immobilizing liquor to make surreptitious traffic in it impossible and its policy would as well cover movements which might be incidental to, as those which immediately terminated in, a delivery to some-

one else. The case of *Street v. Lincoln Safe Deposit Company*, 254 U. S. 88, did not decide anything to the contrary; it turned upon the fact that the possession of the liquor in the leased room and in the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as *Street* had, for the possession of the liquor. I conclude therefore that the carriage in question is "transportation."

The first point being thus disposed of, I come to the second. It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they must be manifested and may not be excessive in quantity, as such they are not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbids generally the transportation of liquors, it must be read in the light of this statute and the long usage under it, and that what is not

43 within the United States for the purposes of customs ought not to be so for purposes of prohibition. In addition they urge that under the maritime law it is held that for most purposes sea-stores will be treated as a part of the ship herself. If she is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and least of all a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to these, *Brown v. Duchesne*, 19 How. 183, *Taylor v. U. S.*, 207 U. S. 120, *Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122. Nevertheless, everyone must agree that the question is no more than one of interpretation, for in the cases at bar Congress certainly might, if it chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

*Grogan v. Walker*, *supra*, and *Anchor Line v. Aldridge*, *supra*, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thorough-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It in-

tended to exercise once for all the complete power of Congress under the Amendment, and its very want of particularity is a good index that it meant to cover what it could. For this reason it is to be distinguished from earlier local acts of the same kind, as for example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful, since in form it only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the policy, and not the promise, of the nation. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

45 However, the motives for positively assuming that such stores must be considered as included within Section three appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legislative motives is speculative, but that vice, if it be one, is of the plaintiffs' making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitations on that meaning, because of the supposed intent of Congress. Since, therefore, I am asked to have recourse to implications, I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises.

In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan v. Walker*, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases

at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the law runs for all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought

and kept here. Ignoring for the moment the crews, all of  
46 the stocks are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question; it must be enough for him that each is forbidden.

47 It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the section covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned diffi-

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culties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crews' rations stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later.

Cases like *Brown v. Duchesne*, *supra*, *Taylor v. U. S.*, *supra*, and *Scharrenberg v. U. S.*, *supra*, are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning of Section 3 accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is *sui generis*, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages. It is true that the prayers for relief do include so much, but prayers without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs than anything I may think about the law. The power under the Seventy-fourth Rule to grant such an order is undoubted, notwithstanding a dismissal of the bill, *Merriman River Savings Bank v. City of Clay Center*, 219 U. S. 527, *Staffords v. King*, 90 Fed. R. 136, (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he holds his decree. Like all such matters, it depends upon a balance between the two, and I must assume that the chances of success are not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some nicety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far

as the loss of the liquors themselves is concerned the damage cannot be said to be irreparable. These must be condemned before they can be forfeited, and in the present state of the calendars the cases at bar will be finally determined long before such libels can be tried. If I am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the long acquiescence of the authorities in the practices here in question will moderate the ultimate penalty of confiscation; I must assume that the plaintiffs will  
 50 receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as a part of the crew's ration. If the ration is cut off, some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages to stay the enforcement of the law against stocks of wine and liquor necessary for crew's rations, if, honestly kept and dispensed for that purpose alone.

As to the maintenance of passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing inter se and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is easy to say, if one does not take seriously the opinion behind the Amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is  
 51 & 52 of itself an irreparable injury which no judge has the right to ignore. The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge, the plaintiffs have no case. Therefore I will go no further than to issue an injunction against inter



fering with the carriage of a stock necessary for the crews' rations on the east-bound voyage. The plaintiffs must each give a bond in the sum of twenty-five thousand dollars, conditional against the use of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal if the same be taken at once. Settle orders on notice.

October 23, 1922.

*D. J.*

53 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants. Opinion. Filed October 23, 1922. Alex. Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York.

54 United States District Court, Southern District of New York.

UNITED AMERICAN LINES, INCORPORATED, ATLANTIC MAIL CORPORATION, AMERICAN SHIP AND COMMERCE NAVIGATION CORPORATION, and Shawmut Steamship Company, Complainants,

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

*Answer to Amended Bill of Complaint.*

Now come the defendants herein and in answer to the amended bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the amended bill of complaint herein and divers parts thereof be dismissed, and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.

2. The Court has no jurisdiction to grant the relief prayed for or any part thereof.



The bill does not present a cause of action in equity under the Constitution of the United States.

4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

6. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

55 & 56 Second. Defendants deny each and every of the allegations of Paragraph "XI" of the complaint.

Third. Defendants deny those allegations of Paragraph "XIV" of the complaint herein which allege that it is lawful for complainants to sell intoxicating liquors on the high seas and in foreign ports and outside of the territorial waters of the United States, and further deny the allegation of Paragraph "XIV" that it is lawful to possess such intoxicating liquors within the territorial limits of the United States whether under seal or not.

Wherefore, defendants pray that the amended bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,  
*United States Attorney for the  
Southern District of New York.  
Attorney for Defendants.*

Office and P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

57 [Endorsed:] E. 25/13. Form No. 336. U. S. District Court, Southern District of New York. United American Lines, Inc., Atlantic Mail Corp., American Ship & Commerce Navigation Corp., and Shawmut Steamship Company, Complainants versus Henry C. Stuart, Acting Collector, etc.; John D. Appleby, Federal Zone Chief, etc., and William Hayward, U. S. Attorney, etc., Defendants. Answer to Amended Bill of Complaint with Notice of Entry. William Hayward, United States Attorney, Attorney for Defendants. Due service of a copy of the within is hereby admitted. New York, —, 19—. —, Attorney for —. To Clark, Carr & Ellis, Attorneys for Plaintiffs, 120 Broadway.

*Answer to A/C.*

SIR:

You will please take notice that an — of which the within is a copy, was this day duly entered in the within-entitled action, in

the office of the Clerk of the U. S. District Court, Southern District of N. Y.

Dated, N. Y., October 17, 1922.

Yours, etc.,

WM. HAYWARD,

*U. S. Attorney, Attorney for Defendants.*

58 The District Court of the United States for the Southern District of New York.

In Equity.

UNITED AMERICAN LINES, INCORPORATED, ATLANTIC MAIL CORPORATION, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants,

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

*Stipulation Amending Bill of Complaint.*

It is hereby stipulated between the undersigned that paragraph IX of the bill of complaint be and hereby is amended by changing the period at the end of the paragraph into a comma, and adding the following:

"and have been accustomed to sell such intoxicating liquors to their passengers for beverage purposes upon the high seas and in foreign ports outside the territorial waters of the United States";

and that paragraph XIII of the bill of complaint be and hereby is amended to read as follows:

59 & 60 "XIII. That defendants, or some of them, have threatened to seize, or attempt to seize the intoxicating liquors now sealed as sea stores aboard the steamship Resolute and aboard the steamships Reliance, Mount Clay, Mount Carroll, and Mount Clinton upon their arrival at the Port of New York, and in case any further sales of intoxicating liquors shall be made by complainants on any of said vessels upon the high seas or in foreign ports, or in case the same shall be carried by the complainants on any of said vessels on the high seas, that the defendants, or some of them, have threatened to prosecute the complainants and to subject them to fine and imprisonment and to seize and forfeit the vessel in which the same shall be carried or sold."

CLARK, CARR & ELLIS,

*Solicitors for Complainants.*

WILLIAM HAYWARD,

*United States Attorney for Defendants.*

61 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York, et al., Defendants. Stipulation Amending Bill of Complaint. Filed October 25, 1922. Alex. Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York, Solicitors for Complainants.

62 The District Court of the United States for the Southern District of New York.

In Equity.

UNITED AMERICAN LINES, INCORPORATED; ATLANTIC MAIL CORPORATION, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants,

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

*Bill of Complaint.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainants, United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company bring this, their bill of complaint, against the above named defendants, and respectfully show unto this Honorable Court as follows:

63 I. The complainant, United American Lines, Incorporated, is a corporation duly organized and existing under the laws of the State of Delaware, with an office at No. 39 Broadway, in the Borough of Manhattan, City, County and State of New York, and within the Southern District of New York, and is the operator and Managing Agent of the American steamships Resolute, Reliance, Mount Clay, Mount Carroll, and Mount Clinton.

II. The complainant, Atlantic Mail Corporation, is a corporation duly organized and existing under the laws of the State of New York, with its principal office at No. 39 Broadway, in the Borough of Manhattan, City, County and State of New York, and within the Southern District of New York, and is, and at all times hereinafter mentioned was, the owner of the American steamships Resolute and Reliance.

III. The complainant, American Ship and Commerce Navigation Corporation is a corporation duly organized and existing under the laws of the State of New York, with its principal office at No. 39 Broadway, in the Borough of Manhattan, City, County and State of New York, and within the Southern District of New York, and is, and at all the times hereinafter mentioned was, the owner of the American steamship Mount Clay.

IV. The complainant, Shawmut Steamship Company is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, with an office at No. 30 Broadway, in the Borough of Manhattan, City, County and State of New York, and within the Southern District of New York, and is, and at all the times hereinafter mentioned was, the owner of the American steamships Mount Carrol and Mount Clinton.

V. The complainants are informed and verily believe, and therefore allege on information and belief, that the defendant, Henry C. Stuart is the Acting Collector of Customs for the Port of New York, and that the defendant, John D. Appleby is the Federal Prohibition Zone Chief for the States of New York and New Jersey, and that the defendant, William Hayward is the United States Attorney for the Southern District of New York, and that said defendants are by law charged with the duty of enforcing the provisions of the Acts of Congress and the Regulations and Decisions of the Secretary of the Treasury hereinbelow referred to, within the Port of New York.

VI. This is a suit of civil nature arising under the Constitution and laws of the United States. The matter in controversy exceeds the sum of three thousand dollars (\$3,000.00) in value, exclusive of interest and costs.

VII. The complainants, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation and Shawmut Steamship Company, through their Operating Agent, the complainant, United American Lines, Incorporated, are and have been engaged in the business of transporting as common carriers, passengers and cargo for hire on the high seas, and since May 1922, fortnightly sailings have been maintained by the said steamships Resolute and Reliance between the port of New York and the ports of Plymouth, Boulogne, Southampton, Cherbourg and Hamburg, and for more than a year last past regular and frequent sailings have been maintained by the said steamships Mount Clay, Mount Carroll, and Mount Clinton between the ports of New York and Hamburg, and future sailings of said steamships are scheduled and have been extensively advertised, and said steamships Resolute and Reliance have been chartered for cruises between January and May, 1923; the steamship Resolute for a round-the-world cruise, and the steamship Reliance for a cruise to South America and the West Indies.

VIII. The said steamships Resolute and Reliance, Mount Clay, Mount Carroll and Mount Clinton are combined passenger and cargo ships of an aggregate value in excess of five million dollars (\$5,000,000.00).

IX. The said steamships during the period of their operation by complainants have maintained and kept as part of their regular sea stores, intoxicating liquors for sale for beverage purposes upon the high seas and outside the territorial waters of the United States, under the authority of, and pursuant to regulations issued by the Treasury Department of the United States, which regulations were promulgated under authority of the National Prohibition Act.

66 X. All of said steamships have on board as part of their regular sea stores, intoxicating liquors purchased in foreign ports. All of said steamships are now in foreign ports, or on the high seas, except the steamship Resolute which is now in the Port of New York, and which has on board intoxicating liquors as part of its sea stores, sealed as required by regulations of the Treasury Department, of a value in excess of three thousand dollars (\$3,000.00).

XI. The intoxicating liquor on said steamships has not been manufactured, sold, or transported within, imported into, or exported from, the United States, or any territory subject to the jurisdiction thereof, within the meaning of the Eighteenth Amendment of the Constitution and the National Prohibition Act.

XII. The Attorney General of the United States, in response to a request for an opinion as to whether the Eighteenth Amendment and the National Prohibition Act prohibited the sale, upon American ships outside the territorial waters of the United States, of intoxicating liquors acquired in foreign ports, advised the Secretary of the Treasury that said practice was illegal, and that American ships wherever located were subject to the terms of the Eighteenth Amendment and the National Prohibition Act.

67 XIII. The complainants believe that defendants, or some of them, will seize or attempt to seize the intoxicating liquors now sealed as sea stores aboard the steamship Resolute and aboard the steamships Reliance, Mount Clay, Mount Carroll, and Mount Clinton upon their arrival at the Port of New York.

XIV. Complainants are advised by counsel, and believe that it is lawful and not prohibited by the Eighteenth Amendment or the National Prohibition Act for them to sell intoxicating liquors on the high seas and in foreign ports, and outside the territorial waters of the United States when such liquors are lawfully acquired in foreign ports and maintained and kept as sea stores, and that it is lawful and not prohibited by the Eighteenth Amendment or the National Prohibition Act for intoxicating liquors so acquired to be kept as sea stores and to remain on board said steamships within the Port of New York or other United States ports under seal of the Collector of

Customs, and that there is no authority or warrant of law for the defendants to seize such intoxicating liquors.

XV. If said intoxicating liquors are seized by the defendants, the complainants will suffer irreparable damage by being deprived of said intoxicating liquors and prevented from selling the same on the high seas and in foreign ports and will further suffer irreparable damage by reason of the diversion of passenger traffic to foreign steamship companies which will continue to sell intoxicating liquors on the high seas, and the consequent impairment and depreciation of a large part of their valuable business and good will; the value of their properties as going concerns will be diminished to the irreparable damage of the complainants, and such injury and damage would be incapable of admeasurement and adjudication in an action at law.

XVI. Complainants have no adequate remedy at law and will be immediately and irreparably damaged as hereinbefore stated unless an injunction is granted.

Wherefore, the complainants pray that the Court will decree

1. That a writ of subpoena be issued herein directed to the defendants above-named, demanding that each of them on a day named, appear and answer the complaint herein, but not under oath, the oath being hereby expressly waived.

2. That the defendants, their successors, agents, servants and subordinates, and each and every one of them, be enjoined and restrained from seizing, disturbing, removing or in any way interfering with the intoxicating liquors now on board the steamship *Resolute* in the Port of New York as sea stores.

3. That the defendants, their successors, agents, servants and subordinates, and each and every one of them, be enjoined and restrained from arresting and prosecuting the complainants, their officers, agents, servants or employees, or any of them, or from attempting any seizure or forfeiture of any intoxicating liquors carried as sea stores on board the complainants' steamships *Resolute*, *Reliance*, *Mount Clay*, *Mount Carroll* and *Mount Clinton*, or of the said steamships, by reason of the fact that such intoxicating liquors may be sold on the high seas and in foreign ports and outside the territorial waters of the United States.

4. That the defendants, their successors, agents, servants and subordinates, and each and every one of them, be enjoined and restrained from enforcing or attempting to enforce, or causing to be enforced in any manner whatsoever, against the complainants, their officers, agents, servants or employees, or any of them, and/or the said steamships, any of the penalties, seizures or forfeitures provided for in the aforesaid Act of Congress or any decisions or regulations of the Secretary of the Treasury, by reason of any sale of said intoxicating liquors which may be made on the high seas or in foreign ports and outside the territorial waters of the United States.

5. That the complainants be granted a restraining order and preliminary injunction pending final hearing and decision of  
 70 this cause, whereby the defendants, their successors, agents, servants and subordinates, and each and every one of them, shall be enjoined and restrained, as heretofore prayed, and that upon final hearing of this cause, said injunction be made perpetual.

6. That a decree may be entered herein in favor of the complainants against the defendants aforesaid, and

7. That the complainants have such other and further relief as they may be entitled to receive and the justice of the cause may require.

CLARK, CARR & ELLIS,  
*Solicitors for Complainants.*

Office and Post Office Address: No. 120 Broadway, Borough of Manhattan, New York City.

71 STATE OF NEW YORK,  
*County of New York, ss:*

On the 13th day of October, 1922, before the undersigned Notary Public duly commissioned and sworn, appeared R. H. M. Robinson, who, being duly sworn, deposes and says that he is the President of United American Lines, Incorporated, and that he is the President of American Ship and Commerce Navigation Corporation, two of the complainants in the above entitled suit; that the foregoing bill of complaint is true except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason that this verification is not made by said complainants is that said complainants are bodies corporate.

R. H. M. ROBINSON.

Sworn to before me this 13th day of October, 1922.

[SEAL.]

HORACE H. POWERS,  
*Notary Public, Kings County.*

Kings Co. Clerk's No. 255, Register's No. 8160.  
 N. Y. Co. Clerk's No. 413, Register's No. 8250A.  
 Bronx Co. Clerk's No. 25, Register's No. 68.  
 Queens Co. Clerk's No. 598.  
 Commission expires March 30, 1923.

72 STATE OF NEW YORK,  
*County of New York, ss:*

On the 13th day of October, 1922, before the undersigned Notary Public duly commissioned and sworn, appeared A. W. Lishawa, who, being duly sworn, deposes and says that he is the Treasurer of Atlantic Mail Corporation, one of the complainants in the above entitled



suit; that the foregoing bill of complaint is true except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason that this verification is not made by said complainant is that said complainant is a body corporate.

A. W. LISHAWA.

Sworn to before me this 13th day of October, 1922.

[SEAL.]

HORACE H. POWERS,  
*Notary Public, Kings County.*

Kings Co. Clerk's No. 255, Register's No. 8160.  
N. Y. Co. Clerk's No. 413, Register's No. 8250A.  
Bronx Co. Clerk's No. 25, Register's No. 68.  
Queens Co. Clerk's No. 598.  
Commission expires March 30, 1923.

73 & 74 STATE OF NEW YORK,  
*County of New York, ss:*

On the 13th day of October, 1922, before the undersigned Notary Public duly commissioned and sworn, appeared E. C. Tobey, who, being duly sworn, deposes and says that he is the President of Shawmut Steamship Company, one of the complainants in the above entitled suit; that the foregoing bill of complaint is true except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason that this verification is not made by said complainant is that said complainant is a body corporate.

E. C. TOBEY.

Sworn to before me this 13th day of October, 1922.

[SEAL.]

HORACE H. POWERS,  
*Notary Public, Kings County.*

Kings Co. Clerk's No. 255, Register's No. 8160.  
N. Y. Co. Clerk's No. 413, Register's No. 8250A.  
Bronx Co. Clerk's No. 25, Register's No. 68.  
Queens Co. Clerk's No. 598.  
Commission expires March 30, 1923.

75 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York, et al., Defendants. Bill of Complaint. Filed October 14th, 1922. Alex. Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York, Solicitors for Complainants.

76 United States District Court, Southern District of New York.

In Equity.

25-13.

UNITED AMERICAN LINES, INCORPORATED, ATLANTIC MAIL CORPORATION, American Ship & Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants,

vs.

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of N. Y., Defendants.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated November 9th, 1922.

CLARK, CARR & ELLIS,  
*Attorneys for Complainants.*

WILLIAM HAYWARD,  
*U. S. Atty., Attorney for Defendants.*

O. K.

W. J. E.

[Endorsed:] Eq. 25-13. United States District Court, Southern District of New York. United American Lines, Incorporated, et al., Complainants, vs. Henry C. Stuart, et al., Defendants. Stipulation as to Correctness of Appeal Record. Record certified November 9th, 1922. (Sgd.) Alex Gilchrist, Jr., Clerk. Clark, Carr & Ellis, Attorney- for Complainants, 120 Broadway, Borough of Manhattan, City of New York.

77 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

In Equity.

25-13.

UNITED AMERICAN LINES, INCORPORATED, ATLANTIC MAIL CORPORATION, American Ship & Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants,

vs.

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of N. Y., Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York this 9th day of November, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX GILCHRIST, JR.,  
*Clerk.*

Endorsed on cover: File No. 29,244. S. New York D. C. U. S. Term No. 694. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship & Commerce Navigation Corporation, et al., appellants, vs. Henry C. Stuart, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York. Filed November 10th, 1922. File No. 29,244.



## Sea Stores of Foreign Vessels.

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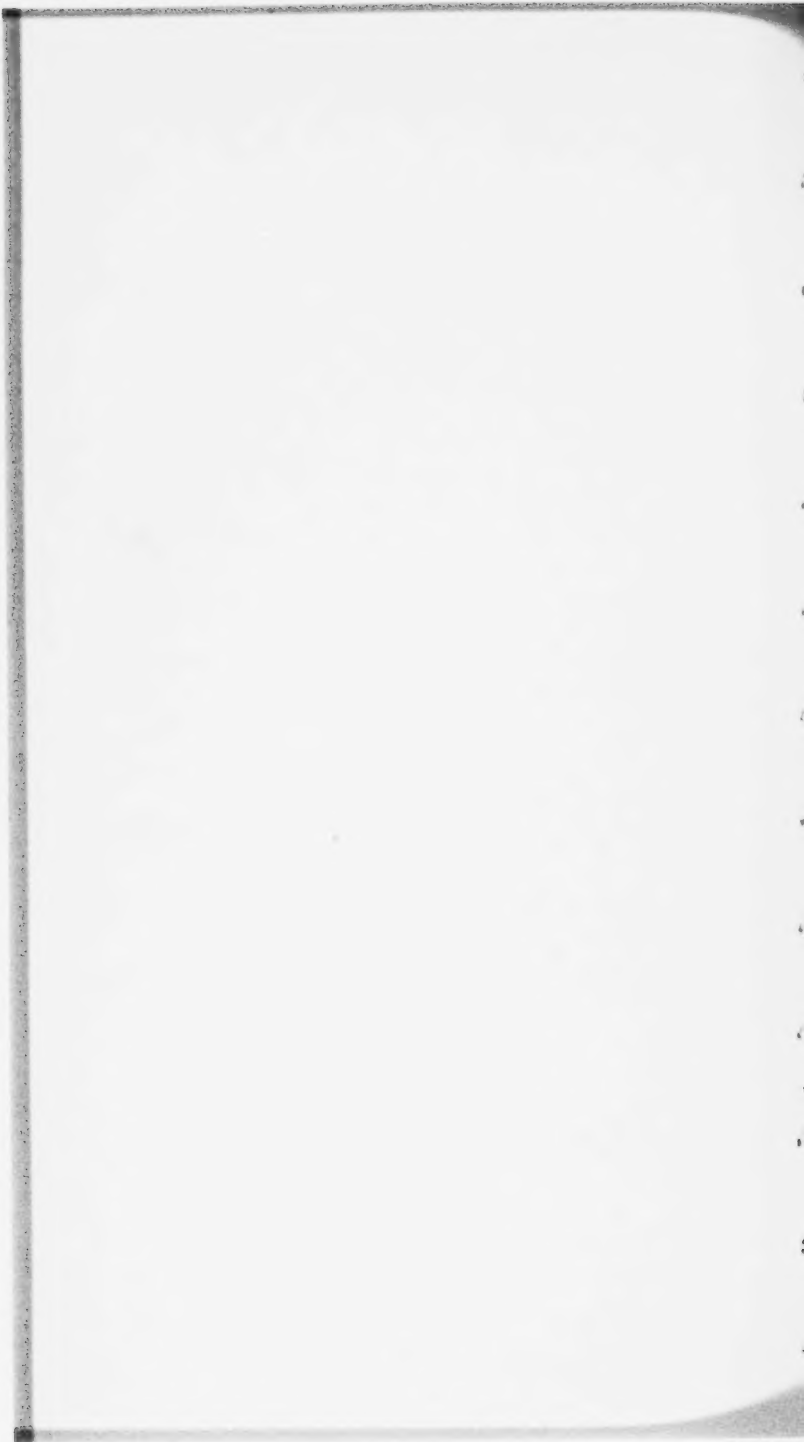
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IN THE  
**Supreme Court of the United States**  
October Term, 1922

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HEN- DERSON BROTHERS) LTD., <i>against</i>	Appellants,	#659.
ANDREW W. MELLON, et. al.,	Appellees.	
OCEANIC STEAM NAVIGATION COMPANY, LTD., <i>against</i>	Appellants,	#660.
ANDREW W. MELLON, et. al.,	Appellees.	
INTERNATIONAL NAVIGATION COMPANY, LTD., <i>against</i>	Appellants,	#661.
ANDREW W. MELLON, et. al.,	Appellees.	
COMPAGNIE GENERALE TRANSATLANTIQUE, <i>against</i>	Appellants,	#662.
ANDREW W. MELLON, et. al.,	Appellees.	
THE NETHERLANDS AMERICAN STEAM NAVIGATION COMPANY (HOL- LAND AMERICAN LINE), <i>against</i>	Appellants,	#666.
ANDREW W. MELLON, et. al.,	Appellees.	
LIVERPOOL BRAZIL AND RIVER PLATE STEAM NAVIGATION COM- PANY, LTD., <i>against</i>	Appellants,	#667.
ANDREW W. MELLON, et. al.,	Appellees.	
THE ROYAL MAIL STEAM PACKET COMPANY, <i>against</i>	Appellants,	#668.
ANDREW W. MELLON, et. al.,	Appellees.	
UNITED STEAMSHIP COMPANY OF COPENHAGEN (SCANDINAVIAN AMERI- CAN LINE), <i>against</i>	Appellants,	#669.
ANDREW W. MELLON, et. al.,	Appellees.	
THE PACIFIC STEAM NAVIGATION COMPANY, <i>against</i>	Appellants,	#670.
ANDREW W. MELLON, et. al.,	Appellees.	
NAVIGAZIONE GENERALE ITALIANA, <i>against</i>	Appellants,	#678.
ANDREW W. MELLON, et. al.,	Appellees.	

## BRIEF ON BEHALF OF FOREIGN STEAMSHIP LINES, APPELLANTS.

GEORGE W. WICKERSHAM,  
*Counsel for Appellants.*



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IN THE  
**Supreme Court of the United States**  
**October Term, 1922**

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HEN- DERSON BROTHERS) LTD.,	<i>Appellants,</i>	#6
<i>against</i>		
ANDREW W. MELLON, <i>et. al.</i> ,	<i>Appellees.</i>	
OCEANIC STEAM NAVIGATION COMPANY, LTD.,	<i>Appellants,</i>	#6
<i>against</i>		
ANDREW W. MELLON, <i>et. al.</i> ,	<i>Appellees.</i>	
INTERNATIONAL NAVIGATION COMPANY, LTD.,	<i>Appellants,</i>	#6
<i>against</i>		
ANDREW W. MELLON, <i>et. al.</i> ,	<i>Appellees.</i>	
COMPAGNIE GENERALE TRANSATLANTIQUE,	<i>Appellants,</i>	#6
<i>against</i>		
ANDREW W. MELLON, <i>et. al.</i> ,	<i>Appellees.</i>	
THE NETHERLANDS AMERICAN STEAM NAVIGATION COMPANY (HOL- LAND AMERICAN LINE),	<i>Appellants,</i>	#6
<i>against</i>		
ANDREW W. MELLON, <i>et. al.</i> ,	<i>Appellees.</i>	
LIVERPOOL BRAZIL AND RIVER PLATE STEAM NAVIGATION COM- PANY, LTD.,	<i>Appellants,</i>	#6
<i>against</i>		
ANDREW W. MELLON, <i>et. al.</i> ,	<i>Appellees.</i>	
THE ROYAL MAIL STEAM PACKET COMPANY,	<i>Appellants,</i>	#6
<i>against</i>		
ANDREW W. MELLON, <i>et. al.</i> ,	<i>Appellees.</i>	
UNITED STEAMSHIP COMPANY OF COPENHAGEN (SCANDINAVIAN AMERI- CAN LINE),	<i>Appellants,</i>	#6
<i>against</i>		
ANDREW W. MELLON, <i>et. al.</i> ,	<i>Appellees.</i>	
THE PACIFIC STEAM NAVIGATION COMPANY,	<i>Appellants,</i>	#6
<i>against</i>		
ANDREW W. MELLON, <i>et. al.</i> ,	<i>Appellees.</i>	
NAVIGAZIONE GENERALE ITALIANA,	<i>Appellants,</i>	#6
<i>against</i>		
ANDREW W. MELLON, <i>et. al.</i> ,	<i>Appellees.</i>	

**SEA STORES OF FOREIGN VESSELS.**

**Statement.**

These cases come up on appeal from final decrees entered in each of ten separate causes by the District Court of the United States for the Southern District of New York, in equity (Judge LEARNED HAND sitting),

dismissing bills of complaint filed to enjoin the defendants, Mellon, Secretary of the Treasury of the United States; Stuart, Acting Collector of Customs for the Port of New York, and Day, Federal Prohibition Director for the State of New York, from enforcing against foreign steamships plying between American and foreign ports the provisions of the National Prohibition Act, as construed by the present Attorney General of the United States (Mr. Daugherty), which reversed the construction placed upon the said act by his predecessor, Attorney General Palmer, and by the General Counsel of the United States Shipping Board.

The cases were heard upon motions by the defendants, upon the amended bills of complaint and answers thereto, to dismiss the bills and motions by the plaintiffs for final decrees granting the relief prayed by the bills. The pleadings were so drawn on both sides as to raise the merits of the controversy. There is no dispute as to the facts, and the questions submitted are purely questions of law.

### ***The Pleadings.***

#### ***Substance of Bills of Complaint.***

Each of the plaintiffs is a foreign corporation, owning and operating lines of steamships carrying passengers between European and American ports, the plaintiffs in Nos. 659, 660, 661, 667, 668 and 670 being British corporations, operating ships of British registry only; the plaintiff in No. 662 being a French corporation, operating ships of French registry; the plaintiff in No. 666 being a Dutch corporation, operating ships of Dutch registry; the plaintiff in No. 669 being a Danish corporation, operating vessels of Danish registry, and the plaintiff in No. 678 being an Italian corporation, operating vessels of Italian registry.

It has at all times heretofore been the practice of British vessels to carry, as part of their Sea Stores, certain wines, liquors and other intoxicating beverages for consumption by the vessels' passengers and crew, such Sea Stores, including such wines, liquors and other intoxicating beverages, being the property of the respective complainants and carried on board their ships solely for such consumption on board the vessels, and not for transportation or landing in the United States or elsewhere, and upon arrival of any vessel in the United States an accurate list of all such Sea Stores, including such wines, liquors and other intoxicating beverages, is furnished to the United States authorities (No. 659, Rec., p. 5).

The Cunard and Anchor Lines, complainants in No. 659, and the White Star Line (No. 660) operate vessels between American and Italian ports. A considerable number of the crews of such vessels plying to and from Italian ports are Italian citizens. On such vessels, plaintiffs carry many third-class passengers, and for their accommodation they must carry a number of Italian stewards. The Italian law requires that certain officers and members of the crew shall be Italian when third class Italian passengers are carried. The laws of the Kingdom of Italy also require that third-class passengers be furnished with half a liter per day of Italian wine, containing not less than twelve per cent. of alcohol, and the rules and regulations established by the Italian Seamen's Federation, which have the approval of the Government of Italy, provide that boys and young men who are members of the crew must receive not less than half a liter of wine per day of the same alcoholic content, and that all other seamen must receive three-quarters of a liter of wine per day, and that firemen and greasers, during the time the ship is under way, shall receive not less than one liter of wine per day, in each instance the wine containing twelve per cent. alcohol (No. 659, pp. 3, 4).



Under the laws of Italy, complainants' vessels cannot sail from the port of New York for an Italian port, transporting more than fifty Italian citizens as third-class passengers, unless the vessel has received a license from the Italian consul, and such license cannot be issued until the supplies and wine on board of the vessel have been tested by an inspector of immigration attached to the Italian consulate. This license cannot be issued unless there is a sufficient quantity of wine, containing not less than twelve per cent. of alcohol, on board said vessels, to furnish the third-class passengers during the voyage with the amount of wine required by the Italian law (No. 659, p. 4).

The appellant in No. 662 is a French corporation, and all of its steamships are French built vessels, registered in France, and not in the United States, and fly the French flag. The laws of the Republic of France require appellant to furnish daily to each member of the crew of each of its steamships one-half a liter of wine of alcoholic content, and to each stoker on said steamships one liter of wine of alcoholic content per day. The said allowance of wine is a part of the hire paid to each member of the crew under the terms of the French law, and by the laws of France not more than one-third the total number of a crew may be of other nationalities than France. Failure to obey these laws would subject appellant, its officers, etc., to penalties enforceable against them under the laws of France, and would result in appellant's inability to use and operate its ships (No. 662, p. 5).

All of the vessels of appellant in No. 678 are Italian vessels flying the Italian flag, its passenger ships being units of the Royal Italian Naval Reserve, registered under the Italian flag, and subject to the provisions of the Italian law, which require the steamships to furnish to the crew and passengers certain liquors containing more than one-half of one per cent. of alcohol.

The Italian Immigration Act and the Ministerial Decree of May 18, 1911, also provide that to every immigrant traveling to foreign countries, there must be given as food, among other things, one-half a liter of Italian wine of twelve per cent. alcoholic content, and for the use of the hospital on such vessels, the regulations prescribe that there must be on board for use in the ship's hospital, on the basis of 1,000 immigrants and for thirty days' voyage, \* \* \* 24 bottles of Barola wine, \* \* \* 24 bottles of Marsala wine, 12 bottles of cognac made from wine \* \* \*. The same Code, Article 170, requires ships bringing third-class passengers of Italian nationality to Italy from transatlantic ports to conform to the foregoing regulations as regards food, sanitary conditions, etc. (Rec. No. 678, pp. 2, 3).

All of the alcoholic liquors carried as Sea Stores on the vessels of the respective appellants are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for Sea Stores is taken on board the vessels of the respective appellants at European ports, and no part of such liquors is intended to be landed in the United States (No. 659, p. 5; No. 660, p. 7; No. 661, p. 4; No. 662, p. 6; No. 666, p. 5; No. 667, p. 5; No. 668, p. 5; No. 669, p. 5; No. 670, p. 5; No. 678, p. 5).

By British law, vessels are required to maintain on board for medicinal purposes certain quantities of wines and liquors (No. 660, p. 14; No. 670, p. 4).

By local regulations in force as to Dutch and Danish vessels, they are required to have on board a certain amount of liquor for medicinal and emergency use, and there are local requirements effective in several of the countries at which the vessels of appellant in No. 666 call, also necessitating the maintenance of a supply of liquors on board ship as a condition of trading with such ports (No. 666, pp. 3-4; No. 669, p. 3).

Since the adoption of the National Prohibition Act, on October 28, 1919, the ships of the respective appellants have been permitted freely to go and come in American ports carrying intoxicating liquors for beverage purposes, as Sea Stores for crew and passengers, pursuant to the following regulations of the Secretary of the Treasury (See *e. g.*, Rec. No. 659, pp. 16-17).

“(T. D. 38218.)

“Sea Stores—Liquors.

“Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 106 and 107 of the Customs Regulations of 1915 as amended.

“Treasury Department, December 11, 1919.

“To Collectors of Customs and Others Concerned:

“All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

“Excessive or surplus liquor stores are no longer dutiable, being prohibited importations, but are subject to seizure and forfeiture.

“Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same line or owner.

“Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(Signed) JOUETT SHOUSE,  
Assistant Secretary.”

On January 27, 1920, the foregoing regulations were modified in accordance with an opinion of the then At-

torney General (Palmer) to read as follows (T. D. 38248):

"All liquors which are prohibited importation, but which are properly listed as sea stores on *American* vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer, and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on *foreign* vessels should be sealed on arrival of the vessel in port, and such portions thereof released from time to time for use by the officers and crew.

"The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification." (See No. 659, p. 17. Italics ours.)

The opinion of the Attorney General last referred to (a copy of which is annexed to this brief at page 67) was rendered at the request of the Secretary of State, pursuant to a communication from the Italian Embassy, apparently asking that during the time of a vessel's stay in port the seal should be removed from the Sea Stores so as to permit the necessary amount of liquor required by Italian law to be served to the crew to be taken out for the use of the crew at meals. The Attorney General (Mr. Palmer) advised the Secretary of the Treasury that while the regulations in question were valid as to American vessels, the status of *foreign* vessels in American ports was different, and that he was not prepared to say that a daily distribution to the crews of foreign ships of the usual quantity for consumption on board ship so affects the peace of this country that American officials were authorized to interfere. Of course, he added:

"the bringing of such liquors on shore even by the members of the crew to whom they are issued would be unlawful and subject the offender to

prosecution, but so long as the liquors on board are properly listed as sea stores and are not excessive in quantity, I do not think their distribution on board the ship can properly be interfered with by this government. I am, therefore, of the opinion that the regulations should be modified to the extent above indicated."

The bills further show, that on or about October 1922, the present Attorney General of the United States rendered a ruling or opinion in which, among other things, he held that foreign ships carrying intoxicating beverage liquors as ships' stores within the three-mile limit of the American shore, were violating the provisions of the National Prohibition Act, and that, thereafter, the President of the United States directed the Secretary of the Treasury to proceed to the formulation of regulations for the enforcement of such rule. The bills set forth the effect such enforcement would have upon the business of the respective appellants, show the great pecuniary loss which would result to them (*e. g.*, Rec. No. 659, pp. 12-14), besides placing them in the embarrassment of conflicting laws of other countries, some of which, as above stated, positively require the ships to carry and serve certain alcoholic beverages for passengers and crew; and being advised that the Secretary of the Treasury and his subordinates were preparing regulations to be promulgated and enforced, contrary to the opinion of the Attorney General, last above referred to, and that it was the intent and threat of the defendants to seize the alcoholic liquors now constituting Sea Stores on the vessels of the respective plaintiffs (some of which are now on the high seas bound to the port of New York), and to enforce against plaintiffs, their agents, etc., the pains and penalties provided by the Act, etc., and being advised that such action would be in violation of law and the Constitution, these bills were filed seeking injunctions restraining the defendants

dants and their subordinates from in any manner enforcing or attempting to enforce against plaintiffs, their servants, etc., any of the pains, penalties or forfeitures provided in and by the respective acts of Congress, or any rules or regulations of the Secretary of the Treasury promulgated to carry into effect the said opinion of the Attorney General, or from proceeding against plaintiffs, their agents, etc., on account of any alleged violation by them of the Eighteenth Amendment or the National Prohibition Act, on the ground that the carriage of intoxicating liquors, as above mentioned, as Sea Stores for crew and passengers is contrary to law (*e. g.*, Rec. No. 659, p. 559; pp. 14-15).

#### ***Voluntary Appearance by Defendants and Answers.***

The United States Attorney for the Southern District of New York appeared generally for all the defendants in each of these cases (*e. g.*, No. 659, p. 9), and filed Answers to the amended bills. The Answer in each case, after objecting (1) that the suit was against the United States, and did not show that it had consented to be sued herein, (2) that the court had no jurisdiction to grant the relief prayed for, or any part thereof, (3) that the bill did not present a cause of action in equity under the Constitution, (4) that the bill did not disclose a cause of action equitable in its nature or civil in its character and arising under the Constitution, (5) and (6) for want of equity; further answered (7) by denying the embarrassment which plaintiffs alleged they would experience in obtaining adequate crews from among the nationals of the countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread, and further, that if the construction claimed by appellants were upheld, such decision would carry with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States; alleged the

danger of the evasion of the restrictions of the law by foreign ships, citing the example of one ship, some of whose company had broken the customs seal on liquors and had attempted to import the liquors into the United States—unsuccessfully—and finally, that if ships of foreign registry should be enabled to transport liquor within the territorial waters of the United States, the resultant damage to American merchant ships would be great and irreparable (*e. g.*, No. 659, pp. 18-21).

### **Decision.**

On these pleadings, each side moved for judgment. The Court granted the motion of the defendants to dismiss the bills and judgments were entered accordingly (*e. g.*, No. 659, p. 30). Judge LEARNED HAND in his opinion (see No. 659, pp. 23-30) held (1) that the carriage of liquor as a part of ship stores within the waters of the United States, although not delivered to any person within those waters, was *transportation* within the meaning of the Eighteenth Amendment and the National Prohibition Act; (2) that the case of *Street v. Lincoln Safe Deposit Company*, 254 U. S., 88 (1920), did not apply, although:

“It is a very plausible argument to say that ship’s stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute” (p. 25).

And that

“Their understanding is not to be ignored in interpreting the law itself, under well settled canons. Since 1799 it has been recognized in the customs regulations of the United States, (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty” (p. 25).

Nevertheless, he held that in view of the canons of construction for the National Prohibition Act, adopted by this court in *Grogan v. Walker* and *Anchor Line v. Aldridge*, 42 Sup. Ct. Rep., 423 (decided May 15, 1922), the statute must be held to override any such exception and construed

"to exercise once for all the complete power of Congress under the Amendment" (p. 25).

and to include in this exercise a prohibition of the carriage of such Sea Stores. The Court further expressed the opinion that the case was different with so much of the stocks as was kept for the crews, that a much stronger argument could be made for the legality of carriage for that purpose, although that also appeared to him to fall within the decisions cited. (See *e. g.*, No. 659, pp. 23-24, 25-28.)

The decrees, while dismissing the bills, enjoined, until final hearing and decision of the cause in this court, the defendants from seizing or interfering with the possession and carriage by plaintiffs of the stock of liquors customary for the rations of the crew of their vessels on eastbound voyages, upon filing a bond in the penalty of \$25,000 conditioned against the gift, issuance or sale of such stock of liquors by plaintiffs otherwise than as crew's rations to crews of their vessels (No. 659, p. 30). The Court refused to enjoin during the same period, interference with the maintenance of stocks of liquor for the use of passengers under the same conditions as those applicable to liquors for rationing the crew (No. 659, p. 29). The plaintiffs respectively prayed and were allowed appeals directly to this Court from the respective decrees dismissing the bills (No. 659, p. 31).

Certain American steamship companies, engaged in operating ships of American registry, also separately filed bills in the District Court, Southern District of New York, to enjoin the United States officials from enforcing



the provisions of the Eighteenth Amendment and the statute against them, in conformity with the opinion of Attorney General Daugherty. Decrees were entered in each of these cases dismissing the bills, from which separate appeals have been prosecuted to this Court.

*International Mercantile Marine Co. v. Stuart*,  
No. 693;

*United American Lines v. Stuart*, No. 694.

These appeals will be argued separately from the appeals taken by the foreign steamship companies.

Judge LEARNED HAND, in the case of the American companies, held that Section 3 of Title II of the National Prohibition Act alone would be enough to cover all places where the Eighteenth Amendment could operate, but that all doubt on that point was removed by the Supplemental Act; that "territory" is not necessarily restricted to "lands" and in the amending act is equivalent to "territorial jurisdiction"; that either phrase meant to include all subjects within the power of Congress; that the exemptions respecting the Panama Canal Zone were not material, the exclusions from the operations of the Act might be permissible—Congress evidently thought they were. His conclusion was that ships of American registry, whether at sea or in a foreign port, were within the Amendment and the Act.

### ***Assignments of Error.***

1. The Court erred in holding that the Eighteenth Amendment prohibits a foreign ship from keeping on board while in the territorial waters of the United States intoxicating beverages constituting part of the customary Sea Stores of such ship, lawfully acquired by it in a foreign jurisdiction, and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

2. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from keeping on board as Sea Stores while in the territorial waters of the United States such intoxicating beverages as are required for the crew as a part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is operating, when said Sea Stores were lawfully acquired and taken on board for such purpose in a foreign country.

3. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as Sea Stores while in the waters of the United States such intoxicating beverages as are required for the passengers as a part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading, when such Sea Stores were lawfully acquired and taken on board for such purpose in a foreign country.

4. The Court erred in holding that the keeping on board of appellants' vessels of intoxicating beverages while the vessels are in the waters of the United States under the conditions above mentioned constitutes transportation of the same within the meaning of the Eighteenth Amendment and the National Prohibition Act.

5. The Court erred in holding that possession of intoxicating beverages within the territorial waters of the United States under the circumstances above mentioned is prohibited by the Eighteenth Amendment and the National Prohibition Act.

### ***History of the Controversy.***

The Eighteenth Amendment became effective January 29, 1919 (40 Stat., 1941). The National Prohibition Act, which was returned by President Wilson

without his approval, was passed over his veto by the two Houses of Congress and became a law on October 28, 1919, (41 Stat. 305). The Treasury Department, on December 11, 1919, issued its regulations, recognizing the immemorial usage of merchant ships to carry alcoholic liquors as part of their Sea Stores, and safeguarding against violation of United States laws, by providing that liquors, properly listed as Sea Stores, should be kept under seal while the vessels were in port, while excessive or surplus liquor stores were subject to seizure and forfeiture. (See *e. g.*, Rec. No. 659, p. 16).

At the instance of the Italian Embassy, requesting that during the time of the stay in port of a foreign vessel an arrangement be made whereby liquors might be withdrawn from under seal for the purpose of serving the crew—undoubtedly having in mind the provisions of the laws of Italy referred to in Rec. No. 678, pp. 2, 3, 10—Attorney General Palmer gave the opinion above mentioned (p. 67), holding that the daily distribution to crews of the usual quantity for consumption on board foreign ships did not so affect the peace of this country that American officials were authorized to interfere (32 Op. Attys. Gen. 96, 97). Whereupon, the Treasury Department promulgated the regulation of January 27, 1920, above referred to, modifying the previous regulation, by providing that all liquors properly listed as Sea Stores on foreign vessels should be sealed on the arrival of the vessel in port, and such portions released from time to time for use by the officers and crew at meals; the previous regulations otherwise to remain in force.

All foreign ships have continued to operate under these regulations. On June 8, 1922, one Adolphus Busch, of the Anheuser-Busch Brewery, in Missouri, returning to America on a ship belonging to the United States Shipping Board, addressed a letter to the President in which he commented severely upon the fact that de-

spite the rule of prohibition within the United States, liquor was freely served on ships operated by the United States Shipping Board on the high seas. This communication was referred by the President to the Chairman of the Shipping Board, who thereupon requested of the General Counsel of that Board an opinion concerning the right of American vessels, including those operated by the Shipping Board, to sell liquor outside of the three-mile limit. On June 13, 1922, Mr. Schlesinger, General Counsel of the Shipping Board, submitted a written opinion to the Chairman to the effect, that neither the Eighteenth Amendment nor the Volstead Law applies to American ships outside the three-mile limit, and, therefore, that, in his opinion, liquor might be sold on all American ships, including Shipping Board ships, beyond those limits. A copy of that opinion is annexed to this brief (p. 69). The matter was referred to the Attorney General, who, on October 6, 1922, rendered an opinion to the Secretary of the Treasury, a copy of which is annexed to this brief (p. 76), holding (1) that the Eighteenth Amendment did apply to *American* ships on the high seas outside the territorial waters of the United States, and that under his interpretation of the Volstead Act and the decisions of this court in *Grogan v. Walker* and *Anchor Line v. Aldridge*, 42 Sup. Ct. Rep., 423 (decided May 15, 1922), the sale, transportation or possession of intoxicating liquor for beverage purposes on *foreign* vessels while in American waters also was prohibited.

The application of the law to prevent even the *possession*, aside from the *use* of liquors, as a part of the Sea Stores on *foreign* ships while in American waters, so far as we are aware, had not previously been suggested by any one, but one of the arguments employed by the owners of the American ships to justify them in furnishing passengers on their ships with intoxicating liquors was, that should they not do so, the foreign ships

would have an advantage which would prevent to a large extent passengers from travelling on the American ships, and in view of this contention, the Attorney General's opinion enveloped the foreign ships equally with domestic ships in the condemnation of the act.

Upon the promulgation of this opinion, on October 7, 1922, and the announcement that the Treasury Department was preparing to issue regulations in conformity with it, these suits were brought and orders granted by District Judge LEARNED HAND, requiring the defendants to show cause why injunctions should not be issued, restraining defendants from seizing, or removing or in any way interfering with intoxicating beverages carried on complainants' ships as Sea Stores, in the manner set forth in the bill. On the return of this order to show cause, the pleadings were so framed by the parties as to present clean cut questions of law without any issue of fact, and thereupon the respective motions were made and argued, and the decrees appealed from entered.

## ARGUMENT.

### I.

**Neither the Eighteenth Amendment, nor the National Prohibition Act, properly construed, require the application of the prohibition to every place wherever the United States may exercise its power.**

The Eighteenth Amendment provides:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited" (40 Stat., 1941).

The National Prohibition Act, Section 3 of Title II, reads as follows:

"Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented" (41 Stat., 305, 308).

Section 33 of Title II provides:

"Sec. 33. After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. \* \* \* But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; \* \* \*." (41 Stat. 305, 317).

This statute contained no provision defining the territory within which it should be operative. It, therefore, was governed by the provisions of R. S. Section 1891:

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

A question having arisen as to the jurisdiction of the courts in the territories and insular possessions of the United States to enforce the act, a section was enacted in the supplemental act of November 23, 1921, reading as follows:

"Section 3. That this Act and the National Prohibition Act shall apply not only to the United States but to all territories subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; and jurisdiction is conferred on the courts of the Territory of Hawaii and the Virgin Islands to enforce this Act and the National Prohibition Act in such Territory and Islands." (42 Stat. 222, 223).

An examination of the debates preceding the enactment of this statute discloses only a most perfunctory consideration of the foregoing section. It clearly appears that the dominating purpose underlying its inclusion in the act was to give power to the courts of Hawaii and the Virgin Islands to enforce the statute:

Mr. Volstead said (61st Cong. Rec., Part 3, p. 3096):

"Section 3 simply makes this proposed law and the National Prohibition Act applicable to Hawaii and the Virgin Islands. The law is in force there, but their courts have no power to enforce it. This gives the courts of those territories power to enforce the law."

Mr. Sterling said (61st Cong. Rec., Part 4, p. 3455):

"Section 3 of the bill simply relates to the application of the bill to the territory of Hawaii and the Virgin Islands and confers jurisdiction on the courts of that territory and those islands to enforce the provisions of this act and the National Prohibition Act."

There is nothing else in all of the many pages of the Congressional Record devoted to a discussion of these

two acts which throws any further light upon the territorial limitations of their application. Especially is there nothing to indicate that Congress was, by this act, extending the application of the law to any place not previously embraced within the description contained in the Amendment, "the United States and all the territories subject to the jurisdiction thereof." It surely is a strained construction to hold that a foreign ship temporarily within American waters is embraced within the phrase "the territories subject to the jurisdiction" of the United States. Nothing in the legislative history of the act supports the contention that Congress had any such intention.

Judge HAND, in his opinion in the American Line cases (*International Mercantile Marine v. Stuart, United American Lines v. Stuart*), says:

"In 1920 the United States had all been organized into states and 'territory,' which meant something and which could only mean possessions acquired by conquest or purchase. To these the amendment extended by its own terms, and the question can only be what those terms meant. If they include ships of American registry, those are within it by the very language; if they do not, Congress cannot extend it to them. Ships are not in a third class."

In this, the learned Judge overlooks the fact that one territory at least—Hawaii—neither has been organized into a State, nor was it acquired by conquest or purchase, and that evidently Congress was in some doubt as to whether or not the National Prohibition Act, *ex proprio vigore*, applied to territories which had not been embodied within the United States, and, therefore, deemed it necessary specifically to extend it to such territory; and the words must be read in connection with those particular island territories described in Section 3. The Philippine Islands undoubtedly are territory subject to



the jurisdiction of the United States, yet we have not heard that the Eighteenth Amendment *ex proprio vigore* applies to them, nor that the National Prohibition Act governs them.

Moreover, Section 20 of Title III of the National Prohibition Act itself involves a recognition of the fact that the statute by its own terms did not apply to everything subject to the jurisdiction of the United States, because it specifically provides for its application to the Canal Zone—which has been defined as not a “territory” but “a place subject to the jurisdiction of the United States” (25 Op. Attys. Gen. 441), and also expressly provides that it shall not apply to liquor in transit through that zone by railroad or steamship. The section is as follows:

“Section 20. That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one’s possession or under one’s control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt or spirituous liquors, except for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes, under regulations to be made by the President, and any such liquors within the Canal Zone in violation hereof shall be forfeited to the United States and seized: *Provided*, that this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad” (41 Stat., 305, 322).

Judge LEARNED HAND, in the American Line cases, dismisses this exemption in the following language:

“Nor is the exemption of the Canal Zone material. Congress has indeed shown that it supposed it could exclude certain transportation from the amendment and perhaps Congress is right. Even so, no inference can be made that it thought the amendment did not apply before it had acted, and if it could, with all deference the supposition would be in error.”

It is somewhat difficult to understand why if Congress was right in supposing it could exclude transportation of liquors from the application of the amendment under any circumstances, it could not exclude it by failure specifically to include, as well as by an exception expressly grafted on to a comprehensive inclusion.

In our view, Section 20 of Title III involves the expression of an important recognition by Congress that it has power under the amendment to exclude from the operations of prohibition in some instances, and if that be true, the words "*territory subject to the jurisdiction thereof*" in the Eighteenth Amendment cannot mean "*wherever the United States may exercise its power,*" as contended by the Government.

The conclusions announced by this Court in the *National Prohibition Cases*, 253 U. S., 350 (1920), are not at variance with this view. It was there declared (p. 386):

"6. The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits."

"The entire territorial limits of the United States" does not include "all places subject to its jurisdiction."

Nor do we think that *Grogan v. Walker* and *Anchor Line v. Aldridge*, 42 Sup. Ct. Rep., 423 (decided May 15, 1922), properly construed are at variance with our view. Indeed, Mr. Justice HOLMES, in the prevailing opinion says (p. 424):

"The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many

things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. \* \* \* It is obvious that those whose wishes and opinions were embodied in the amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay. When, therefore, the amendment forbids not only importation into and exportation from the United States but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the amendment itself. The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. Title 3, §20, 41 Stat. 322."

We have here at least a tacit recognition that Congress had the right to permit transportation within its jurisdiction for some purposes and under some circumstances. This language was used in support of the decision in *Grogan v. Walker* (1) that the act forbade the carriage by rail through the United States of intoxicating liquors shipped in bond from a point in Canada to a point in Mexico, Central or South America, and (2) in *Anchor Line v. Aldridge*, that it also prohibited the transshipment of whiskey from one British ship to another in the harbor of New York, although the whiskey was consigned from a port in England to one in South America, and merely was carried through the port and city of New York.

*Anchor Line v. Aldridge* was decided on bill and answer. The bill sought to enjoin the seizure of ship-

ments of intoxicating liquors coming into the Port of New York on foreign steamships, consigned through to British possessions in the West Indies, and intended to be transshipped from one vessel to another within American territory. The answer contains allegations respecting this transportation which were admitted by the motion for judgment on the pleadings. Article Eighth of the Answer (Rec., p. 26), reads as follows:

"Eighth. On information and belief, that in all cases of such liquors arriving by vessel, the responsibility of the importing vessel appears to cease forty-eight hours after the landing of the shipment or upon the actual delivery to a Government truckman or lighterman. That such intoxicating liquors are frequently to be exported by a vessel berthed at a different dock and schedule—to sail sometimes as much as twelve days after the landing of the importing vessel, and that in some cases the dock from which the exporting vessels sail is as much as six or seven miles by land or water from the berth of the incoming vessel, as for instance where shipments arriving on the Anchor Line at Pier 64, North River, at West 23rd Street, New York City, are destined to be exported by a vessel sailing from the piers of the Bush Terminal in South Brooklyn, N. Y. That in all cases there elapses some time, of perhaps a day or more, and there is involved some carriage by land or water or both, and that such lapse of time and necessity of carriage in this port has subjected such liquors to pilferage, loss and other unlawful disposition, with the result that large quantities of such liquor enter into consumption for beverage purposes in the United States."

This undoubtedly was "transportation" within the United States. The District Court (MAYER, D. J.), held that Congress had plenary power to prohibit the transportation of liquor for beverage purposes, even though the liquor was destined for some place outside the United

States or territory subject to the jurisdiction thereof, and that by the National Prohibition Act, it had prohibited such transportation, and this Court concurred in that opinion. This presents a state of facts radically different from those under consideration in the case at bar.

This decision, and even the language of the prevailing opinion in this court, which would seem to go beyond the necessities of the decision in its broad construction of the act, is not conclusive on the question whether or not the act prohibits foreign ships from bringing within the waters and ports of the United States spirituous liquors as a part of their Sea Stores for the use of their crew and passengers, in conformity with the established usage of commerce and under regulations such as those which have prevailed under the authority of the United States since 1799.

In adopting the broad canon of construction which controlled the decision rendered by this court in *Grogan v. Walker* and *Anchor Line v. Aldridge* (*supra*), it is evident that the Court placed emphasis upon the controlling force of the admonition contained in Section 3 of Title II of the National Prohibition Act enjoining liberality of construction, to the end that the use of intoxicating liquor as a beverage might be prevented. Let us consider what meaning and purpose are to be assigned to the Eighteenth Amendment and the enforcing act. Certainly the first sense of every law must be that the field of its operation is the country of its enactment. This is equally true of the Eighteenth Amendment and the National Prohibition Act. Necessarily, they get their meaning from the field and purpose of their operation—from the conditions which exist in the field or are designed to be established there. The transportation that they prohibit is transportation within that field—that is, the United States and its Territories “for beverage purposes.” The transportation and the purposes are, therefore, complements of

each other and both must exist to fulfill the declared prohibition. Thus considered, the "admonition" which received such emphasis in the adoption of this broad canon of construction, and was relied upon by the lower court herein, loses all force under the circumstances of the instant case. Liberality of interpretation is enjoined to the end "that the use of intoxicating liquor as a beverage" may be prevented. These words carry with them an unspoken but necessary qualification, namely, "within the United States, its Territories, Hawaii, and the Virgin Islands."

We have said that the transportation and purposes are complements of each other and both must exist to fulfill the required prohibition. The foreign steamship lines do not seek to transport liquor through, for use as a beverage within, the United States, its Territories, Hawaii, or the Virgin Islands.

## II.

**A foreign ship temporarily within the waters of the United States is not "territory subject to the jurisdiction" of the United States, within the meaning of the Eighteenth Amendment and the National Prohibition Act.**

The jurisdiction exercised by a State over foreign vessels within her waters has been the subject of much controversy.

On the one hand, it is held that, in a sense, the vessel is part of the territory of the nation to which it belongs, and those on board are subject to its laws, even in a foreign port (*Vattel*, book 1, c. 19, §216; *Wheat. Int. L.*, 157; *Brown v. Duchesne*, 19 How., 183; *Wilson v. McNamee*, 102 U. S., 572 (1880); *U. S. v. Bowman*, decided November 13, 1922, No. 69), while on the other hand, it is

held, with certain reservations, that by voluntarily coming into the waters or ports of one nation, the ships of another submit themselves to the laws of the former (*U. S. v. Diekelman*, 92 U. S., 520 (1875), *Wildenhus's Case*, 120 U. S., 1 (1887); *The Exchange v. McFaddon*, 7 Cranch, 116, 144 (1812).

Professor Moore (2, *Dig. Int. Law*, p. 292), adopts the rule contained in Attorney General Cushing's opinion given in 1856 (8 *Op. Attys. Gen.* 73), to the effect that:

"The local port authority has jurisdiction of acts committed on board of a foreign merchant ship while in port, provided those acts affect the peace of the port, but not otherwise; and this jurisdiction does not extend to acts internal to the ship, or occurring on the high seas."

H. Taylor, *International Public Law* (1901), Sec. 268, says:

"As Mr. Webster said in the case of *The Creole*, 'the rule of law and the comity and practice of nations allow a merchant vessel coming into any open port of another country voluntarily, for the purpose of lawful trade, to bring with her and keep over her to a very considerable extent the jurisdiction and authority of the laws of her own country. A ship, say the publicists, though at anchor in a foreign harbor, possesses its jurisdiction and its laws \* \* \*.'"

Wheaton's *Int. Law*, 5th Eng. Ed., 1916; by Coleman Phillipson, page 169, says:

"Generally speaking, we may now say that, though the municipal law of different States varies more or less on this question, private vessels when in foreign ports and waters enjoy exemption from the local jurisdiction in regard to such offences as affect simply the crew or the internal discipline of the vessel, and also to those delinquencies that do not involve a breach of the peace of the port."

In II Wharton's *Conflict of Laws*, 3rd Ed., Rochester, 1905, the author says:

“§816. \* \* \* Every state is internationally entitled to take cognizance of offences on board its own ships wherever they may be.

“§817. \* \* \* The state having territorial jurisdiction over the port has a concurrent jurisdiction; but the prevalent opinion is, that unless the peace of the port is disturbed, the territorial government will not take cognizance of an offense committed on board a foreign ship, the parties being exclusively foreigners.”

Alexander Porter Morse, in an interesting and learned essay entitled “Is There a Law of the Flag, as Distinguished From the Law of the Port, in Respect to Merchant Vessels in Foreign Waters?” published in 1890, reviews the authorities on the subject and reaches the conclusion that

“By usage and under recognized principles of modern international law, and in the absence of treaty and statute provisions, there is a law of the flag in respect to merchant vessels, which is exclusive of the law of the port.”

42 Albany L. J., pages 345, 353.

In 1884, Mr. Frelinghuysen wrote to Mr. Randall as follows:

“A merchant vessel in port is within the jurisdiction of the country owning the port with references to offenses committed on shore or by any member of the crew on board when the peace of the port is disturbed.”

(Cited in 42 Albany L. J., p. 350.)

Mr. Morse points out that Heffler, Phillimore, Twiss and Hall maintain the doctrine of exclusive local jurisdiction, while Webster, Wheaton, Bluntschli, Ortolan, Calvo, Halleck, Dana, Bar, Negrin, Massé and Lawrence maintain that there is a law of the flag which is some-



times of exclusive and sometimes of concurrent jurisdiction.

"This government," wrote Secretary Marcy to the British Minister (Crampton), on April 19th, 1856, "does not apply the doctrine of extra-territoriality to its private or merchant ships in foreign ports, *except in cases where it has been conceded by treaty or established usage* \* \* \* " 42 Albany L. J., p. 350. (Italics ours.)

OPPENHEIM states that it is agreed by all authorities that a foreign merchantman and the persons thereon fall under the jurisdiction of the littoral state in case peace and order outside the ship are disturbed or persons other than the crew or passengers are affected. But, he adds:

"But many writers maintain, and the practice of France and some other States supports their view, that the littoral State has no jurisdiction in case only the internal order of the ship is affected, or the relations between members of the crew or passengers are alone concerned. However, there is no rule of International Law which limits jurisdiction to this extent, and it can therefore claim jurisdiction in all matters over such merchantmen and the persons thereon as have cast anchor within the maritime belt or entered a port. On the other hand, the littoral State is not compelled to exercise such jurisdiction, and many States have therefore by commercial and consular treaties stipulated that in such cases as those in which the internal order of the ship is alone concerned, jurisdiction should be exercised, not by the littoral State, but by the home State through its consul. \* \* \* "

(Oppenheim, International Law (1920), Vol. 1, 3rd Ed., §189.)

To the same effect is Ortolan, *Diplomatie de la Mer*, Vol. 1, pages 192-193.

Dr. Charles N. Gregory, in an article read to the International Law Association at its meeting at Antwerp on September 29, 1903, printed in 2 Michigan Law Review, page 333, summarizes the law on this subject under seven distinct conclusions, of which the third is as follows:

"That as to vessels belonging to private owners in foreign territorial waters jurisdiction attaches, whether those waters are enclosed or littoral, very much at the discretion of the local state, but with a constant practice in local authorities to refuse jurisdiction if the ship and its company are alone affected."

Halleck (International Law [1908], 4th Ed., by Baker, Vol. I, pp. 245-246), says that the rule of law and the comity and practice of nations

"allow a merchant vessel of one State coming into an open port of another, voluntarily, for the purposes of lawful trade, to bring with her, and keep over her, to a very considerable extent, the jurisdiction and authority of the laws of her own country, excluding, to this extent, by consequence, the jurisdiction of the local law. This jurisdiction of a nation over its vessels, while lying in the port of another, is [not]\* wholly exclusive. For any unlawful acts done by her while thus lying in the port of another State and for all contracts entered into while there, by her master or owners, she is made answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption from the local laws be claimed for them. But the comity and practice of nations have established the rule of international law that such vessel so situated is not, as termed by Lord Stowell, a 'mere movable,' but that she is for the general purpose of governing and regulating the rights, duties and obligations of

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\*The omission of the word "not" is evidently a printer's error.

those on board, to be considered under the jurisdiction of, and a part of the territory of, the nation to which she belongs. The local authorities, therefore, have a right to enter on board a foreign merchantman in port, for the purpose of enquiry universally, but, according to Ortolan and Massé, for the purpose of arrest only in matters within their ascertained jurisdiction."

This doctrine is cited and approved by Dana (Wheaton's Elements of Int. Law, 8th Ed., 1866, sec. 95, note 58).

In *Wildenhus's Case*, 120 U. S., 1, 12 (1887), it was decided that the local authorities of this country have jurisdiction over the crime of felonious homicide committed on board a foreign merchant vessel within the port of the United States, and that the Circuit Court might issue a writ of *habeas corpus* to determine whether one of the crew of such vessel in the custody of the state authorities, charged with the commission of the crime, is exempt from local jurisdiction under treaty provisions. In discussing the limits beyond which local jurisdiction would not be applicable in the case of merchant vessels voluntarily in our ports, Mr. Chief Justice WAITE said (p. 12):

"From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."

With respect to criminal matters, Halleck states the judicial power of the state extends, with certain qualifications, *i.e.*, to the punishment of all offenses, by whomsoever committed, on board its public or private vessels on the high seas and on board its public vessels and in some cases on board its merchant vessels in foreign ports. (International Law, 4th Ed., Vol. I, p. 247.) This jurisdiction was recently upheld in this court in the case of *United States v. Bowman*, decided November 13, 1922, where the Court said, speaking by the Chief Justice:

"We cannot suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intended to include them in the section" (Adv. Op., p. 7).

That decision, reversing the District Court, upheld an indictment for conspiracy to defraud the Fleet Corporation, in which the United States is a stockholder, laying the offense, in part, on the high seas and, in part, at the port of Rio Janeiro in the Republic of Brazil.

### III.

**The courts will never give a construction to a statute contrary to international law or the accepted custom and usage of civilized nations, when it is possible reasonably to construe it in any other manner.**

*The Paquete Habana*, 175 U. S., 677 (1900);  
*Murray v. Schooner Charming Betsy*, 2  
 Cranch, 64, 118 (1804).

The same rule, *a fortiori*, should apply to the construction of a provision in the Constitution. Presumably, provisions of the latter are not intended to regulate the affairs of foreign nations or to upset established international usage. If, as we contend, the Amendment does not foreclose the question, then it becomes one of statutory construction, namely, whether Congress intended to disregard the long established general rule respecting the jurisdiction of the country of a visiting ship over its internal affairs and to impose its will with respect to such internal management, in cases which cannot in any respect be considered as affecting the peace and order of the port in which the ships come. In construing other statutes which might affect such internal management, the Federal courts have been careful to avoid, unless constrained by the obvious, inescapable meaning of the act, giving such construction to the statute as would lead to a conflict of laws, or interference with well settled international usage or unduly to interfere with the internal management of the ship.

In *Schooner Exchange v. McFaddon*, 7 Cranch, 116, 136 (1812), Chief Justice MARSHALL said:

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

"This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

"The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and com-

plete jurisdiction within their respective territories which sovereignty confers.

"This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

"A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world."

In the case of *The Charming Betsy* (*supra*), Chief Justice MARSHALL said (p. 118):

"It has also been observed that an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

"These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration."

In an early case—*The Brig Wilson v. United States*, Fed. Cas. No. 17,846, 1 Brockenbrough, 423 (1820)—decided on the circuit in 1820, by Chief Justice MARSHALL, an act of Congress (February 28, 1803; 2 Stat. 205, L. & B. Edition) forbade any master or captain of a ship or vessel, to *import* or *bring* into any port or place of the United States, any negro, mulatto, or other person of color, where the admission or importation of such persons was prohibited by the laws of the State in which such port was situated. It was held that this act did not apply to colored seamen, employed in navigating the vessel.

"I have contended," said the Chief Justice (p. 245), writing on this branch of the case, "that the power of congress to regulate commerce, compre-

hends, necessarily, a power over navigation, and warrants every act of national sovereignty, which any other sovereign nation may exercise over vessels, foreign or domestic, which enter our ports. *But there is a portion of this power, so far as respects foreign vessels, which it is unusual for any nation to exercise, and the exercise of which would be deemed an unfriendly interference with the just rights of foreign powers.* An example of this would be, an attempt to regulate the manner in which a foreign vessel should be navigated in order to be admitted into our ports; and to subject such vessel to forfeiture, if not so navigated. *I will not say, that this is beyond the powers of a government, but I will say, that no act ought to have this effect given to it, unless the words be such as to admit of no other rational construction.*" (Italics ours.)

To the same effect was the decision in *Brown v. Duchesne*, 19 How., 183 (1856), where it was held that the right of property and exclusive use granted to a patentee do not extend to a foreign vessel lawfully entering one of our ports; and the use of such improvement in the construction, fitting out, or equipment, of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs.

Chief Justice TANEY said (p. 194) :

"This question depends upon the construction of the patent laws. \* \* \*

"The general words used in the clause of the patent laws granting the exclusive right to the patentee to use the improvement, taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish."

The Court said that the power to grant patents vested in Congress by the Constitution

“is domestic in its character, and necessarily confined within the limits of the United States. It confers no power on Congress to regulate commerce, or the vehicles of commerce, which belong to a foreign nation, and occasionally visit our ports in their commercial pursuits. That power and the treaty making power of the General Government are separate and distinct powers from the one of which we are now speaking, and are granted by separate and different clauses, and are in no degree connected with it. And when Congress are legislating to protect authors and inventors, and their attention is necessarily attracted to the authority under which they are acting, and it ought not lightly to be presumed that they intended to go beyond it, and exercise another and distinct power, conferred on them for a different purpose” (p. 195).

The Chief Justice pointed out that the principal and almost the only advantage which the defendant derived from the use of the patented improvement was on the high seas, and in other places out of the jurisdiction of the United States; that so far as the mere use was concerned, the vessel could hardly be said to use it while she was at anchor in the port, or lay at the wharf; that patent laws did not embrace improvements on foreign ships lawfully made in their own country which had been patented here; that cases of that kind were not in the contemplation of Congress in enacting the patent laws, and could not, on any sound construction, be regarded as embraced in them. Such a construction, instead of conferring legal rights on the inventor, among other things, would seriously impair the commerce of the country with foreign nations.

“We think these laws ought to be construed in the spirit in which they were made—that is



founded in justice—and should not be strained by technical constructions to reach cases which Congress evidently could not have contemplated without departing from the principle on which they were legislating and going far beyond the object they intended to accomplish” (p. 197).

The Dingley Act, enacted June 26, 1884, entitled “An Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes” (23 Stat., 53), made it unlawful in any case to pay any seaman wages before leaving the port at which such seaman may be engaged, in advance of the time when he has actually earned the same, etc. This section, it was declared, “shall apply as well to foreign vessels as to vessels of the United States \* \* \* .” (Sec. 10, p. 56).

In *The State of Maine*, 22 Fed., 734 (1884), Brown, J., held in the United States District Court for the Southern District of New York, that the statute did not apply to the case of the shipment of seamen at Antwerp on an American ship being at anchor there. It was held that

“the shipment of seamen in a foreign port, and the payment either of advance wages or of bills previously incurred, as in this case, as an advance of wages, are acts done and completed wholly upon foreign soil; and therefore wholly beyond the jurisdiction of this country” (p. 735).

It appeared that the men were shipped in Antwerp under the supervision of the American consul at that port, and the bills were paid by the captain through him. BROWN, J., said:

“If American vessels be treated as a part of the territory of the United States, and within its jurisdiction, though in foreign ports, still, acts like the present, that are not done upon shipboard, but, as I have said, are completed upon land prior to the seamen’s coming aboard, and as a means of

procuring them to do so, would not be done within the territorial jurisdiction of this country" (p. 735).

In *The Kestor*, 110 Fed., 432 (D. C., D. Del., 1901), there was submitted for construction to the U. S. District Court of Delaware an amendment to the Dingley Act above referred to, passed December 21, 1898 (30 Stat. 755), by Section 24 of which it was made unlawful in any case to pay any seamen wages in advance of the time when the same were actually earned, and it was provided that any such payment should not absolve the vessel or the master from full payment of the wages after the same were earned, and

"(f) That this section shall apply as well to foreign vessels as to vessels of the United States; and any master, owner, consignee or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner or agent of a vessel of the United States would be for a similar violation: Provided, That treaties in force between the United States and foreign nations do not conflict" (30 Stat. 763).

Finding that there was no treaty between the United States and Great Britain inconsistent with such application, in view of this specific language, the Court (BRADFORD, J.) held that the statute was intended to apply to the case of British subjects shipping to the United States on British vessels, and that it did so apply. It was pointed out that this statute expressly amended the earlier act and was intended to be applicable, except in cases where an existing treaty conflicted, to cases of foreign seamen shipping in our ports on foreign merchantmen, as well as to American seamen shipping in our ports on either domestic or foreign ships. It also was pointed out that the prepayment of wages for which credit was claimed in the instant case was made in the port of Baltimore

and, consequently, within the territorial jurisdiction of the United States, and that therefore it was within the power of Congress to exercise jurisdiction over such payment, which had been done, specifically by the language of the statute under consideration.

In the case of *Patterson v. The Eudora*, 190 U. S., 169 (1903), it appeared that the appellants shipped on board the Bark *Eudora*, to serve as seamen for a direct voyage from Portland, Maine, to Rio and other points, the final port of discharge to be in the United States or Canada. The questions certified were whether the Act of Congress of December 21, 1898 (30 Stat. 755), referred to in *The Kestor* (*supra*), was properly applicable to the contract made in that case, and whether under the agreed statement of facts, upon a libel filed by said seamen after the completion of the voyage, against a British vessel, to recover wages which were not due them under the terms of their contract or under the law of Great Britain, the libellants were entitled to a decree against the vessel. Both these questions were answered in the affirmative. It was remarked by the Court that it did not appear that the contract of shipment or the advance payment was made *on board the vessel*. On the contrary, the stipulated fact was that the "seamen were engaged in the presence of the British vice consul at the port of New York" (p. 176). As to that, the Court said, "*The wrongful acts were therefore done on the territory and within the jurisdiction of the United States*" (p. 176; italics ours). Mr. Justice BREWER, in delivering the opinion of the Court, said (p. 176):

"It is undoubtedly true that, for some purposes, a foreign ship is to be treated as foreign territory. As said by Mr. Justice BLACKBURN, in *Queen v. Anderson*, L. R., 1 Crown Cases Reserved, 161, 'A ship, which bears a nation's flag, is to be treated as a part of the territory of that nation. A ship is a kind of floating island.' Yet when a foreign

merchant vessel comes into our ports, like a foreign citizen coming into our territory, it subjects itself to the jurisdiction of this country."

The Court cited *Schooner Exchange v. McFaddon*, 7 Cranch, 116, 136, 146 (1812) and *Wildenhus's Case*, 120 U. S., 1, 11, 12 (1887) and continued as follows:

"It follows from these decisions that it is within the power of Congress to prescribe the penal provisions of section 10, and no one within the jurisdiction of the United States can escape liability for a violation of those provisions on the plea that he is a foreign citizen or an officer of a foreign merchant vessel. It also follows that it is a duty of the courts of the United States to give full force and effect to such provisions. \* \* \* The implied consent of this government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which those vessels belong may be withdrawn. Indeed, the implied consent to permit them to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn, it may be extended upon such terms and conditions as the government sees fit to impose. And this legislation, as plainly as words can make it, imposes these conditions upon the shipment of sailors in our harbors, and declares that they are applicable to foreign, as well as to domestic, vessels. Congress has thus prescribed conditions which attend the entrance of foreign vessels into our ports, and those conditions the courts are not at liberty to dispense with. The interests of our own shipping require this" (p. 178).

This *decision*, it will be noted, was limited to a case where the seamen were shipped and the advance payment made on shore, within the territorial limits of the United States, to wit: in the City of New York.

In *Sandberg v. McDonald*, 248 U. S., 185 (1918), the Court had before it a later statute on the same subject, entitled, in part, "An Act To promote the welfare of American seamen in the merchant marine of the United

States," enacted in 1915 (38 Stat. 1164), section 10 of which, repeating the prohibition of advance payment of seamen's wages, specifically provided:

"(e) That this section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation."

It appeared that the libelants shipped upon The *Talus*, a British ship, at Liverpool, where they received certain advances made to them by the ship or its agents, "a practice usual and customary and not forbidden by the laws of Great Britain" (p. 191). They boarded the ship at Dublin, Ireland, and left her at Mobile, Alabama, where they demanded of the master of the ship payment of their wages, and upon receiving the amount which they had earned, less the amounts paid to them upon shipping, as aforesaid, libelled the ship, claiming the benefit of the statute above cited. A majority of the court, speaking through DAY, J., held that, by the statute in question, Congress did not intend to make invalid the contracts of foreign seamen, so far as the advance payment of wages is concerned, when the contracts and payment were made in a foreign country where the law sanctions such contract and payment.

"Had Congress intended to make void such contracts and payments," said the Court at page 195, "a few words would have stated that intention, not leaving such an important regulation to be gathered from implication. There is nothing to indicate an intention, so far as the language of the statute is concerned, to control such matters otherwise than in the ports of the United States."

So it may with equal force be said that if Congress had intended to extend the prohibition of the possession of intoxicating liquors on foreign merchant ships within American waters as ship stores in conformity with established usage it would have so stated that intention in unmistakable language "not leaving such an important regulation to be gathered from implication."

Stress was laid in *Sandberg v. McDonald*, *supra*, upon the limitation of the application of the statute by its own provisions, "as well to foreign vessels *while in the waters* of the United States as to vessels of the United States" (p. 194).

"Legislation," said the court, "is presumptively territorial and confined to limits over which the law-making power has jurisdiction. *American Banana Co. v. United Fruit Co.* 213 U. S. 347 (1909), 357. In *Patterson v. Bark Eudora*, *supra* [190 U. S. 169] this court declared such legislation as to foreign vessels in United States ports to be constitutional. We think that there is nothing in this section to show that Congress intended to take over the control of such contracts and payments as to foreign vessels except while they were in our ports. Congress could not prevent the making of such contracts in other jurisdictions" (pp. 195-196).

There was a vigorous dissent from this decision by four of the Justices, who contended that the statutes under consideration expressed something more than the particular relations of ship and seaman.

"They express the policy of the United States which no private conventions, no matter where their locality of execution, can be adduced to contravene" (p. 201).

They maintained that if the foreign vessel be in the waters of the United States, every provision of the act applies to it as far as it can apply, and that it gives the

right to seamen on a foreign vessel to demand from the master one-half part of the wages which they shall have earned at every port, and makes void all stipulations to the contrary, and, therefore, when the foreign vessel came into the United States port, the seamen had a right to recover the amount of wages earned up to that time without crediting advances made to them in the foreign ports, and to hold the ship and its master liable in the United States courts for such amount. But the majority of the Court gave the act effect only to the limit compelled by its language.

In *Neilson v. Rhine Shipping Co.*, 248 U. S., 205 (1918), the libelants shipped on the American bark *Rhine*, at Buenos Ayres on a voyage to New York. It was stipulated that the shipping of seamen on sailing vessels at Buenos Ayres was controlled by certain shipmasters, to one of whom the libelants, in accordance with the usual custom and as a means of securing employment, signed a receipt or advance note for one month's wages. These advance notes were presented to the American Vice Consul at Buenos Ayres before the libelants signed the articles, were by him noted on the articles, and in the presence of libelants directed to be paid on account of the wages of the respective libelants. It was further stipulated that in directing the master of the *Rhine* to honor such advance notes, the Consul was acting in accordance with Section 237 of the Consular Regulations of the United States. When the bark arrived at New York, the libelants were paid the wages earned less the amounts advanced. They then sought to recover the sum thus deducted, by virtue of the terms of the act above referred to, on the theory that such advances were unlawful and of no effect. The difference between the case thus presented and that in *Sandberg v. McDonald*, was that in the former the advances were made by the master of an American vessel in a South American port, whereas in the latter case, the advances were made to

foreign seamen in a British port. Mr. Justice DAY, speaking for a majority of the Court, said (p. 213):

"That American vessels might be controlled by congressional legislation as to contracts made in foreign ports may, for present purposes at least, be conceded. It appears that only by compliance with the local custom of obtaining seamen through agents can American vessels obtain seamen in South American ports. This is greatly to be deplored, and the custom is one which works much hardship to a worthy class. But we are unable to discover that in passing this statute Congress intended to place American shipping at the great disadvantage of this inability to obtain seamen when compared with the vessels of other nations which are manned by complying with local usage."

Again, four of the Justices dissented, saying (p. 215):

"We regard the act of Congress as clear and that the theatre of its injunction is the harbors of the United States. It is misleading to dwell upon the jurisdiction of other places, which is but another name for control. The jurisdiction, control, is in and by the United States and the command is that advances shall not be deducted from wages of seamen on vessels, American or foreign, while in the waters of the United States. Where they were made or under what circumstances made are not factors in judgment. They are the mere accidents of the situation and if they reach the importance and have the embarrassment depicted by counsel, the appeal must be to Congress, which no doubt will promptly correct the improvidence, if it be such, of its legislation."

Again the majority of the Court held to a construction which avoided interference with the foreign ship beyond the point clearly indicated by Congress.

So it uniformly has been held that the acts prohibiting the bringing of Chinese laborers to the United States are not violated by a foreign vessel coming into one of



our ports with Chinese as seamen or members of the crew.

*In Re Moncan*, 14 Fed., 44 (Cir. Ct., D. Oregon 1882);

*United States v. Ah Fook*, 183 Fed., 33 (C. C. A., 9th Circ., 1910);

*United States v. Burke*, 99 Fed., 895, 898 (Cir. Ct. S. D. Ala., 1899);

*United States v. Jamieson*, 185 Fed., 165 (Cir. Ct., S. D. N. Y., 1911); appeal dismissed, 223 U. S. 744 (1912).

In *Taylor v. United States*, 207 U. S., 120 (1907), the Court construed a statute which made it the duty of the owners of a vessel bringing an alien to the United States under penalties to prevent the landing at a place other than designated by the immigration officers. An Austrian, a sailor on a Cunard steamship, went ashore at New York on leave and failed to return. It was sought to hold the Company liable under this statute. But this Court held, speaking by HOLMES, J., at page 125, that the words "bringing to the United States" in the statute, plainly mean, "transporting with intent to leave in the United States and for the sake of transport—not transporting with intent to carry back, and merely as incident to employment on the instrument of transport," and that the requirement as to landing did not apply to the ordinary shore leave of sailors of the crew.

In *Scharrenberg v. Dollar Steamship Company, et al.* 245 U. S. 122 (1917), the Court held that inducing and assisting aliens to come from abroad working as seamen on the way for bona fide service as seamen on an American ship during her voyage from American ports to foreign countries and while she lies in such ports preparatory to or in the course of such voyage, is not an assisting or encouraging of the importation or immigration of alien

"contract laborers" "into the United States" within the meaning of Sections 4 and 5 of the Act of February 20, 1907 (34 Stat. 898, as amended in 36 Stat. 263). The Court further held that an American ship engaged in foreign commerce is not a part of the territory of the United States, in the sense that seamen employed upon her while in American ports or on voyages, can be said to be performing labor in this country within the meaning of the statutory provisions above referred to. Mr. Justice CLARKE referred to the definition of "contract laborers" contained in the Act, viz. (p. 125):

"Persons \* \* \* who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled."

"In familiar speech" the court said (p. 126), "a 'seaman' may be called a 'sailor' or a 'mariner,' but he is never called a 'laborer,' although he doubtless performs labor when assisting in the care and management of his ship; and a 'seaman' is defined in the United States statutes applicable to 'merchant seamen' as being any person (masters and apprentices excepted) who shall be employed to serve in any capacity on board a vessel, Rev. Stats., Sec. 4612. In the shipping articles which the United States law requires shall be signed by members of the crews of ships of American registry engaged in foreign commerce, the men are designated as 'seamen' or 'mariners.' Thus neither in popular nor in technical legal language would the men employed on the Mackinaw be called or classed as 'laborers,' and such seamen are not brought 'into this country' to enter into competition with the labor of its inhabitants, but they come to our shores only to sail away again in foreign commerce on the ship which brings them, or on another as soon as employment can be obtained. \* \* \* This construction of the Act also has long been applied by the Department of Labor in its practical administration of the law."

These decisions illustrate the extreme care which this court has exercised to so limit the application of acts of Congress that they shall not interfere with the internal affairs of visiting foreign merchant ships, except and to the extent of, an inescapable Constitutional or congressional mandate giving them such effect.

The executive departments also always have exercised like care in avoiding such interpretative application of statutes as unnecessarily to interfere with international commercial relations. An example of this is furnished by the construction put by the Department of Justice upon the statute against the importation of opium. Section 1 of the act on this subject (35 Stat. 614; 38 Stat. 275, 276) made it unlawful "to import into the United States" opium, but contained a proviso permitting the importation of opium other than smoking opium for medicinal purposes only.

Section 2 imposed a penalty upon any person who should

"fraudulently or knowingly import or bring into the United States"

any opium contrary to law.

Section 4 provided that any person subject to the jurisdiction of the United States who should receive or

"have in his possession, or conceal on board of or transport on any foreign or domestic vessel  
\* \* \* destined to or bound from the United States or any possession thereof, any smoking opium \* \* \* "

should be subject to a penalty.

In 27 Op. Attys. Gen., 440, the Attorney General, in construing these sections, held that the bringing of smoking opium into a port of the United States on one vessel for immediate carriage abroad by another vessel was not legally an importation, and that such transshipment could lawfully be made. The correctness of this opinion was not

questioned, but Congress thereupon amended the law by expressly enacting, not only that no smoking opium should be admitted into the United States "or into any territory under the control or jurisdiction thereof for transportation to another country," but that no opium should "be transferred or transshipped from one vessel to another vessel within any waters of the United States for immediate exportation or any other purpose." Here the intention of Congress was clearly expressed in language which is in marked contrast with the provisions of the National Prohibition Law, and which illustrates how clearly the Congressional will is expressed where it intends to apply a domestic regulation to foreign merchant ships in American ports. But the care which Congress there used to exclude this article from our territorial waters serves also to point out the underlying distinction between the situation there existing and the facts of the instant case. Section 5 of the Opium Act dealt only with *smoking opium*, which had no legitimate uses and which for years had been considered an international outlaw, the mere presence of which within their borders was considered intolerable by all civilized nations. Here, on the other hand, it appears from an examination of the National Prohibition Act that Congress has permitted the possession and use of intoxicating beverages in the homes of our people acquired prior to the effective date thereof. The Act also repeatedly recognizes as legal the existence of large quantities of bonded liquor within the United States, as also the manufacture, sale and transportation of intoxicating liquor for other than beverage purposes (Section 3 and Section 37 of Title II). It cannot, therefore, be said that the National Prohibition Act imposes an *unqualified prohibition*, still less can it be said that Congress intended to prevent the mere presence within our borders of intoxicating beverages under any and all circumstances for the Act itself proves

a contrary intention. Congress has not only failed to use language sufficient to indicate that liquor could not be possessed within our borders for any purpose, but under the system of qualified prohibition imposed by the Act there was no reason why it should prohibit the presence of such liquor within our territorial waters as an incidental element to the continuation of international commerce sanctioned by the usage and custom of civilized nations since the inception of our Government. In marked contrast with this also is the record of congressional action respecting the subject under consideration in the cases at bar. From the date of the enactment of the National Prohibition Act, foreign ships had been bringing into American waters and ports liquors as a part of the ships' stores, for consumption by passengers and crew on the high seas with the approval and subject to regulations promulgated by the Treasury Department, in conformity with international usage and the uniform course of American law and regulation from the foundation of the Government. This was a matter of newspaper notoriety and general knowledge. Treasury decisions had been promulgated which sanctioned the practice, and the Attorney General of the United States had declared its legality and laid down the rules under which it should be conducted. And yet, in the legislation of 1921, by which Congress sought to strengthen the law in other directions and to clothe the courts of the Territory of Hawaii and the Virgin Islands with jurisdiction to enforce the Act, no mention was made of this subject and no attempt to broaden the scope of the law, so as to apply it to foreign vessels in American ports. It seems incredible that Congress had intended to apply prohibition to foreign merchant ships, it would not have expressed such intention in the amending act. The fact that it did not, furnishes strong evidence that it had no intention of interfering with the well established usages of international

commerce. This moreover is emphasized by the fact that Section 5 of the amending act expressly dealt with the application of prohibition to common carriers by land and sea. This section in part provided as follows:

"If distilled spirits \* \* \* are lost \* \* \* while in possession of a common carrier subject to the Transportation Act of 1920 or the Merchant Marine Act of 1920, or if lost by theft from a distillery or other bonded warehouse, and it shall be made to appear to the commissioner that such losses did not occur as the result of negligence \* \* \* no tax shall be assessed or collected upon the distilled spirits so lost \* \* \* " (42 Stat. 223).

It is important to note in this connection that the provisions of the Transportation Act of 1920 are expressly applicable to foreign merchant vessels; and yet, neither the framers of the act, nor those who discussed it on the floors of Congress, suggested that the amending act should be broadened so as to make it clear that the possession by a foreign common carrier by vessel within American waters of intoxicating liquors for beverage purposes, was prohibited by our laws. That they did not is strong evidence that they had no intention of extending prohibition to those limits.

When Congress legislated with respect to intoxicating liquors in the territory of Alaska, by Act approved February 14, 1917, (39 Stat. 903), it clearly expressed its intention to apply prohibition to vessels within the territorial waters by the following language in Section 29 of the Act:

"Sec. 29. That any person, company, or corporation who shall import or carry liquors into or upon the territorial waters of Alaska in or upon any steamship, steamboat, vessel, boat or other watercraft, or shall permit the same to be so imported or carried into or upon said waters, \* \* \* "

shall be subject to the penalty.

This act again illustrates the care which Congress always has exercised to make it clear whenever it intended that its enactment should have a *quasi* extra-territorial application.

So in dealing with the Canal Zone, Congress, unrestricted by the limitations of the Constitution or the Eighteenth Amendment but legislating as a domestic legislature, enacted in Section 20, Title III, of the National Prohibition Law the following:

“That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one’s possession or under one’s control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt, or spirituous liquors, except for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes, under regulations to be made by the President, and any such liquors within the Canal Zone in violation hereof shall be forfeited to the United States and seized: \* \* \* .” (41 Stat. 305, 322).

It will be noted that this prohibition went far beyond the Amendment or the National Prohibition Act. It not only prohibited the importation but the *introduction* into the Canal Zone. It absolutely prohibited *possession* by an individual or his having under his control any of the described beverages. Then, in order to emphasize its intention that these extreme measures should not be extended so as to interfere with foreign commercial intercourse, it added the following proviso:

“*Provided, That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad.*” (Italics ours.)

Mr. Justice HOLMES, in dealing with this section in the *Grogan Case*, *supra*, referred to the fact that the Eighteenth Amendment meant a great revolution in the policy of this country, and said (p. 424):

"The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words."

The learned Justice, it seems to us, overlooked the fact that the provisions affecting the Canal Zone in the National Prohibition Act are not included in the general provisions relating to the United States, but in a specific section incorporated in the act to deal with that place. Section 20, Title III, places the Canal Zone in a special position. For, as we have pointed out, it subjects its inhabitants to greater prohibition than those enacted with respect of the United States in general in other portions of the act. It will be noted that Congress has not said in the proviso that the *act* shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad, but that "*this section*" shall not apply. In other words, as the language of the section goes far beyond the confines of the Amendment and the Act, Congress deemed it necessary to disclaim the application of its provisions, that is, the provisions of the *section*, to commerce passing through the Zone. And, therefore, it cannot be that by referring in Section 20 to the carriage on the Panama Canal and on the Panama Railroad, Congress intended that no other transportation of liquor anywhere within the United States, or its possessions, was authorized except through the Canal Zone. The proviso completes the legislation by Congress respecting the Zone, but it has no bearing on the interpretation of the Act itself in its application to the United States. It does illustrate the care which Congress has taken in this act, as in so many others, to avoid the implication of legislation affecting foreign merchant vessels, save and except in the particulars where its deliberate and expressed policy was to apply legislation to those ships.



## IV.

**Sea Stores on merchant ships are considered as part of the ship itself and always have been exempted from tariff and other laws affecting merchandise introduced into the country.**

“‘Sea Stores,’ in our tariff legislation, are the stores contained in incoming vessels which are necessary for their use for the purposes of the voyage. These stores are plainly enough merchandise when purchased, and they are so treated by the statutes (Rev. Stat., sec. 3111) until put aboard ship. They then become, practically speaking, part of the equipment of the ship, which equipment, like the ship itself, is exempt from duty, because, though personal property, it is not regarded as an import (*The Conqueror*, 49 Fed. Rep., 99, 103, 105). This seems to have been assumed from the very beginning of our Government, it being taken for granted that sea stores were exempt from duty even before they were expressly made exempt. The name was always restricted to articles which, brought into port aboard ship, were to be consumed aboard or carried off again on the outward voyage; or, if put ashore at all, landed only for the convenience of the ship itself. (See act of Aug. 4, 1790, chap. 35, sec. 22; act of Mar. 2, 1799, chap. 22, sec. 45; Rev. Stat., secs. 2795, 2796, 2797.) Articles do not become ‘sea stores’ until they have thus become part of the ship’s equipment” (21 Op. Attys.-Gen. 92, 94 [OLNEY]).

The Act of March 2, 1799, amended May 1, 1872, and then codified into Section 2775, Revised Statutes, requires a special report of spirits and wines on board vessels coming into our ports, carried as sea stores. The master is required on arrival to specify his sea stores in order that the precise nature and extent of such pro-

visions may be known, and their immunities established. Under the general requirements as to the manifest which must be made by masters of foreign vessels coming to United States ports, there is provision requiring "an account of the sea stores remaining, if any" (R. S., 2807, as amended by Act of June 3, 1892, 27 Stat. 41).

The question of sea stores and their relation to the manifest under the above-mentioned statutes was discussed by Mr. Justice BALDWIN, sitting on Circuit, in the case of *United States v. Twenty-four Coils of Cordage*, Fed. Cas. No. 16,566; Baldwin, 502 (Cir. Ct., E. D. Penn., 1832).

Mr. Justice BALDWIN said on page 279:

"It directs a manifest of the cargo to be made out, 'together with the name or names of the passengers, distinguishing whether cabin or steerage passengers, or both; their baggage and packages belonging to each, together with an account of the remaining sea stores, if any.' To the question, what are such sea stores? a plain answer is furnished; such articles of provision and stores, as were put on board by the captain or passengers, and not consumed on the voyage, but remaining on hand at its termination. The words 'vessel and cabin stores,' in the form of the manifest, are not inserted for the purpose of introducing any distinct class or kind of sea stores, but merely as the head, under which those designated in the preceding part of the section should be entered on the manifest, as the 'remaining sea stores.' These views of the law are very fully apparent in the thirtieth section, prescribing the form and requisites of the oath of the master to the manifest. 'And I do further swear, that the several articles specified in the said manifest, as the sea stores for the cabin and vessel, are truly such, and were bona fide put on board for the use of the officers, crew and passengers thereof; and are intended to remain on board, for the consumption of said officers and crew.' If the ship has on board wines, spirits or teas, the captain is, by the same section, required to report the quantity and kind on board,

as sea stores, to enter them in the manifest under that head, and to superadd his oath, as in the case of other sea stores on board."

In the case of *United States v. One Hempen Cable and One Hempen Hawser*, Fed. Cas. No. 15,931a, 41 Niles' Reg. 273 (1831), Judge DAVIS, in the District of Massachusetts, in construing the Customs Laws, spoke of sea stores as follows, at page 265:

"'Vessel and cabin stores', is the expression in the 23d section of the collection law; in the 45th section, it is, 'sea stores of a ship or vessel.' These expressions are understood to mean, and naturally do mean the stores or provisions laid in for cabin or steerage, for officers, passengers or crews, or if further extended, can only be applicable to articles of consumption, perishing in the using, and not to the tackle and apparel of the ship, the sails, rigging, cables or anchors. These are to be considered as attached to the ship, and so belonging to the ship that it is no more necessary to include them in the manifest than the ship itself."

See also,

*The Satellite*, 188 Fed., 717 (D. C., D. Mass. 1910);

*The Penn*, 273 Fed., 990 (C. C. A. Third Circuit 1921).

Sea stores are considered as part of the ship—its furniture or appurtenances, within the meaning of policies of marine insurance and under statutes affecting the liability of ship owners.

In *Pelley v. The Royal Exchange Assurance Company*, 1 Burr, 341, Lord Mansfield held that the destruction of a ship's sea stores, while temporarily on land, was to be considered in the same light as if the accident had happened on board the ship, and a recovery might be allowed under a policy of insurance upon the "furniture" of the vessel.

The plaintiffs obtained a verdict on an order to show cause why a new trial should not be granted.

In *Brough v. Whitmore*, 4 Term Rep. 206, Lord Kenyon, Ch. T., speaking for the unanimous Court, said at page 208:

"On the trial of this cause I had nothing to guide my judgment on the construction of this instrument but the words of the policy; and when it was stated that 'provisions' were included in the word 'furniture,' I confess I was somewhat at a loss to know to what extent the underwriters were liable on words so indefinite as these which are used. But then I thought, and still continue to think, that the rule of law is to be given (not by merchants) but by the Court; though, when a question arises on the construction of the words of an instrument, which are in themselves ambiguous, it is a matter fairly within the province of those who alone act upon such instruments to declare the meaning of them; and I remember it was said many years ago that, if Lombard Street had not given a construction to policies of insurance, a declaration on a policy would have been bad on a general demurrer; but that the uniform practice of merchants and underwriters had rendered them intelligible.

The question here arises on the meaning of the word 'furniture.' One of the jurymen said, and in that he is now confirmed, that, according to the understandings of those who enter into these contracts, *it includes the provisions for the use of the crew*. Now, among the several accidents, against which the defendant insured, are perils by fire; and this ship being at Canton, it became necessary to refit her, and to take out all her goods, and land them on this island, where the accident happened; by which these provisions, with the rest of the goods, were burned; and there is no doubt but that the loss on this island must be considered in the same light as if it had happened on board the ship itself. This was determined in *Pelley v. The Royal Assurance Company* (1 Burr, 341). Then if these provisions be insured as part of the

outfit of the ship, and they were consumed by one of the perils insured against, there is an end of the question; a loss has happened within the meaning of the policy; and consequently the defendant is liable. But it was said in the argument that the instant any of the provisions were consumed on board there could not be a total loss; but the short answer to that is, that that comes within the wear and tear of the ship, and it might as well be said that if a mast were a little injured, there could not be a total loss. If this decision were to militate against any determination, or even an *arbiter dictum*, of Lord Mansfield, I should have hesitated for some time before I delivered my opinion. But the case of *Robertson v. Ewer* is clearly distinguishable from the present; here the goods were consumed by an accident by fire on board the ship (for the island was for this purpose equivalent to the ship) and within the meaning of the policy of insurance; but in that case they were consumed by the negroes during a detention of the ship."

As a result the rule was discharged.

In the case of *The Dundee* 1 Hagg. Adm., 109, Lord Stowell decided that the *fishing stores* of a vessel engaged in The Greenland fisheries were *appurtenances* of the ship within the meaning of 53 Geo., 3, c. 159, restricting the liability of ship owners in cases of loss to the value of the ship, freight, etc. "The word appurtenances," said he, "is a word of wider extent than *furniture*, and may be properly applied to many things that could not be so described (with propriety, at least) in a contract of insurance. It may not be a simple matter to define what is, and what is not, an appurtenance of a ship. There are some things that are universally so, things must be appurtenant to every ship, *qua* ship, be its occupation what it may. But I think it is rather gratuitously assumed that particular things may not become so, from their immediate and indispensable connection with a ship, in the particular occupation to which

she is destined, and in which she is engaged. A ship may have a particular employment assigned to her which may give a specialty to the apparatus that is necessary for that employment. \* \* \* The word 'appurtenances' must not be construed with a mere reference to the abstract, naked idea of a ship; for that which would be an incumbrance to a ship one way employed, would be an indispensable equipment in another, and it would be a preposterous abuse to consider them alike in such different positions. You must look to the relation they bear to the actual service of the vessel."

This decision was affirmed in the Court of King's Bench, *Gale v. Laurie*, 5 B. & C., 156, where it came up on a declaration in prohibition. ABBOTT, C. J., however, makes a distinction between the use of the word in the statute and in contracts of insurance, which renders it doubtful whether such stores would pass under a bill of sale of a ship, etc., and leaves it to be determined by usage. "We think," he says (p. 164), "that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances within the meaning of this act, whether the object be warfare, the conveyance of passengers or goods, or the fishery. This construction furnishes a plain and intelligible general rule; whereas, if it should be held that nothing is to be considered as part of the ship that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions, and much discussion and cavil. It is true, that in the case of insurance these stores are not considered as covered by an ordinary policy on the ship. But insurance is a matter of contract, and the construction of the contract depends in many cases upon usage. And the construction of a policy can furnish no rule for the construction of this act of parliament, which was passed for purposes of a different nature."

In the English Marine Insurance Act of 1906, which is a codification of the maritime practice on the matter of marine insurance, the insurable value of the ship is thus stated in Section 16 of the Act, which can be found as an appendix A at page 1659, Volume II, of the Tenth Edition of Arnould on Marine Insurance.

Section 16 reads as follows:

\* \* \* \* \*

“(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen’s wages and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, thus the charges of insurance upon the whole.

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade.”

\* \* \* \* \*

Arnould on Marine Insurance (Tenth Edition), Vol. 1, at page 295, Section 219, also deals with the question of the insurance on ships as embodied in Schedule 1 of the Marine Insurance Act above referred to:

“Schedule 1 of the Marine Insurance Act, 1906, contains Rules for the construction of policies in the ordinary form, which apply where the context does not otherwise require. No. 15 of these Rules provides that ‘the term “ship” includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.’ ”

“(The clause ‘and also upon the body, tackle, etc., in this policy made it unnecessary before the

Act to decide whether fittings or stores were covered by the word 'ship.' Thus it was held that the provisions put on board the ship, when she sails, for the use of the crew on the voyage, are comprehended under the word 'furniture,' and protected by an insurance on the 'body, tackle, apparel, ordnance, furniture,' etc., of the ship in the common printed form. The contrary position had been erroneously inferred from the case of *Robertson v. Ewer*, which decided no such point, but merely established that the underwriter on ship could not be liable for the consumption of such provisions while the ship was detained by an embargo.

"It was admitted, in *Brough v. Whitmore*, that all the ship's stores and tackle were also included in the insurance on ship in the common form.

"The word 'outfit' is sometimes used to denote the necessary stores and provisions put on board the ship for the use of the crew on the voyage; and, in this sense, outfit is included in a general insurance on ship. It is in this sense that Lord Ellenborough uses the word when he says that hull and outfit are both protected by an insurance on ship. (*Hill v. Patten* [1807], 8 East, 373, 375; *Forbes v. Aspinall* [1811], 13 East, 323, 325.)"

A further proof of the incorporation of stores into the ship is the fact that they are valued by surveyors when valuing the ship for general average contribution as part of the contributory value of the ship.

In Lowndes on General Average, which is perhaps the best known of all books on General Average, the following rule is laid down in Section 76:

"The ship, the cargo, and the freight, constitute, generally speaking, the whole of the property on shipboard liable to contribute to general average. Should there be any kind of property, not coming under any of these heads, which is preserved from destruction by a general average act, this likewise must contribute, unless these be some special reason for exempting it. The lives which are pre-



served are not brought into account; by reason, it has been said, of the impossibility of assessing them at a pecuniary value. The mariners are not required to contribute in respect of their wages; the reason given being, that they are supposed to have done their share towards the ship's preservation by their personal efforts. The luggage and personal effects of passengers and crew do not contribute; the former, apparently for no other reason than the comparative insignificance of their value. These are the only exemptions. Everything which is covered by an ordinary policy of insurance on the ship, that is to say, her appurtenances of every kind, including the provisions laid in for the voyage and unconsumed at the end of it, is brought into contribution as included in the value of the ship. If there be anything else on shipboard, not constituting merchandise in the proper sense of the word, yet possessing a substantial value, it ought to contribute. For example, the unconsumed stores of a troop ship, or those laid in by a passenger charterer; planks or other materials used as dunnage, or covering-boards, or for the construction of temporary bulkheads for cargo, or the like, should properly be brought in as contributing. It is only the small value of such articles which occasions their being, in practice, frequently disregarded."

It is also a very interesting fact that in the case of many European nations a separate list of ship's stores is considered as part of the ship's papers in addition to the ordinary cargo manifest. In this connection see Atherly Jones on *Commerce in War*, pages 347 to 352.

It was held in *United States v. Hawley & Letzerich*, 160 Fed., 734 (Cir. Ct., S. D. Tex., 1908), that coal was not sea stores and the following definition of sea stores was given by Judge Burns, in reviewing a decision of the Board of General Appraisers, at page 739:

"The sole question for review as disclosed by the pleadings and relied upon in the argument is

whether or not 'coal' is a part of the sea stores of the vessel. 'Sea stores' are defined in Commercial Navigation as 'the supplies of different articles provided for the subsistence and accommodation of the ship's crew and passengers.'

"It follows, therefore, that coal being no part of the vessel's sea stores, the petition for review should be sustained, the decision of the Board reversed, and the action of the Collector of Customs in all things affirmed."

As set forth in the Bills of Complaint (*supra*), the laws of Italy, France and Holland, require merchant ships trading with their ports to carry and furnish liquors for the consumption of passengers and crew. In those cases, liquors are *necessaries* within the meaning of the Admiralty Law. See *The Satellite* (*supra*).

It was, therefore, in pursuance of a long applied doctrine of sea law and the consistent legislative policy that, after the adoption of the Eighteenth Amendment and the passage of the National Prohibition Act, the Treasury Department promulgated regulations covering sea stores of liquors which have been in force up to the present time. The consistent policy maintained until the enactment of the National Prohibition Act, and after its enactment, under approval of the Treasury Department and the Attorney General, was in conformity with the uniform policy of the United States from the foundation of the government. The question raised by the opinion of Attorney General Daugherty and the decision of the District Court in the present cases, presents to this Court the question of whether or not the necessary construction of the Prohibition Law overrules this consistent uniform continued policy of our government, and, disregarding all international comity, imposes our domestic regulations upon all foreign vessels coming into our ports.

## V.

Even if the foreign steamships within American ports or waters should be considered as territory subject to the jurisdiction of the United States, nevertheless the carriage of intoxicating liquors as part of their Sea Stores under the circumstances described in the bill is not a violation of the Amendment or the Statute.

Two specific questions of construction arise with respect to the application of the Amendment and the Act to sea stores on foreign vessels within American waters: (1) Does it involve the *transportation* of liquors within the United States? (2) Is the mere *possession* a violation?

The Eighteenth Amendment prohibits the

manufacture	} within
sale	
transportation	
importation	into
exportation	from

the United States and all territories subject to the jurisdiction thereof, of intoxicating liquors for beverage purposes.

The National Prohibition Act by Section 3 of Title II, extends this prohibition to *possession* "except as authorized by" the act.

And by Section 33 of Title II, the *possession* of liquors by any person not legally permitted under the statute to possess liquor is made

"*prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title" (41 Stat., 305, 317).

It is well settled law, that the carriage of ship stores on board a foreign vessel coming into ports of the United States and on its departure therefrom is neither *importation* into nor *exportation* from the United States. Indeed, it was conceded by the United States Attorney in the District Court that "the Government does not contend and will not that these ships either export or import the liquors \* \* \* that is, within the meaning of the law and statute."

In *Swan & Finch Co. v. United States*, 190 U. S., 143 (1903), it was held that goods placed on board a vessel bound for a foreign port to be used on board the vessel during its voyage, and in fact so used and consumed, were not exported within the meaning of the statute allowing, under certain circumstances, a draw-back on the exportation of imported articles on which duties have been paid. The Court said, per BREWER, J. (p. 144):

"Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country. 'As the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other.' 17 Op. Attys. Gen., 583. \* \* \* It cannot mean simply a carrying out of the country, for no one would speak of goods shipped by water from San Francisco to San Diego as 'exported,' although in the voyage they are carried out of the country. Nor would the mere fact that there was no purpose of return justify the use of the word 'export.' Coal placed on a steamer in San Francisco to be consumed in propelling that steamer to San Diego would never be so designated. Another country or state as the intended destination of the goods is essential to the idea of exportation."

In the same way, it must be that the legal notion of importation is a severance of goods from the mass of things belonging to another country and the bringing of them into this country, with the intention of uniting them to the mass of things belonging to this country.

See

*The Conqueror*, 49 Fed., 99, 102 (D. C., S. D. N. Y., 1892); affirmed, 166 U. S., 110 (1897).

"To 'import' is to bear or carry into. An 'imported article' is an article brought or carried into this country from abroad. \* \* \* A vessel arriving in the ordinary course of navigation is no more 'imported', in the ordinary sense of that word, than she is 'transported.'"

The goods are neither manufactured within the United States, nor intended to be sold therein, and, therefore, the next question under the amendment is whether or not they are *transported* within the United States for *beverage* purposes.

That the carriage of liquors from one point to another within the United States may not amount to *transportation* within the prohibition of the amendment and the statute, is recognized in the case of *Street v. Lincoln Safe Deposit Co.*, 254 U. S., 88 (1920). When the amendment took effect, Street owned certain intoxicating liquor which was stored in a warehouse in a room under his exclusive custody and control. He sought to remove it from that place to his own residence. This, it was held, it was entitled to do. The transportation which was necessary in order that the liquor might be taken from the one place to the other was declared to be legal by virtue of the fact that lawful ownership, possession and control of the liquor on the part of the individual transporting the same, existed at the commencement and at the termination of such transportation. The very basis of the decision is found in the fact that Street did lawfully possess, control and have ac-

cess to the liquor both at the place from which and the place to which the transportation was effected. In this connection, Mr. Justice CLARKE said (p. 93):

"That transportation of the liquors to the home of appellant, under the admitted circumstances, is not such as is prohibited by the section is too apparent to justify detailed consideration of the many provisions of the act inconsistent with a construction which would render such removal unlawful, and that the act is understood by the officers charged with its execution as permitting such transportation is shown by the provision of the regulations of the Bureau of Internal Revenue authorizing permits for the transportation of liquors from one permanent residence of an owner to another in case of his removal, although no such transfer is in terms provided for by the act."

In commenting upon the applicability of this decision to the case at bar, Judge HAND said (Rec. No. 659, p. 24):

"The case of *Street v. Lincoln Safe Deposit Company*, 254 U. S., 88, did not decide anything to the contrary; it turned upon the fact that possession of the liquor in the leased room and in the house were both lawful, and that the *movement* from one to the other could not be unlawful. To apply it to the cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. *The steamers have no express warrant of law, as Street had, for the possession of liquor.*" (Italics ours).

But in the *Street* case the Court did not hold that the individual might lawfully own, possess and control a quantity of intoxicating liquor for an indefinite period at any point along the line of transit from the storeroom to the private residence. The Court expressly admitted that "no such transfer is in terms provided for by the act" (p. 93). No express statutory authority is given to

any individual by the National Prohibition Act to own, possess, control or have access to intoxicating liquors during the period of transit within the territorial limits of the United States between points at which such ownership, control, etc., is made lawful. Street had no "express warrant of law" (in the words of Judge HAND's decision) either to transport or possess liquor on the streets of New York City during the transit of the same from the storeroom to his private residence. With due respect, it would seem that Judge HAND begs the question, when he says: "\* \* \* the lawfulness of the possession here depends upon whether this is transportation under the statute." So far as the actual period of transportation is concerned, Street had no more express statutory right to ownership, possession, control and access to intoxicating liquors during such transportation than have the steamship lines within our territorial waters under the facts and circumstances of this case. The distinction is found in the source from which is derived the legality of the respective ownership, use, possession, control and access to intoxicating liquor at the points from which and to which the "transportation" is effected. In the case of the steamship lines, the transportation begins from a foreign port, where their ownership, use, possession and access to liquors is lawful. Some of the liquors are consumed by the passengers and the crew on the high seas. They are not destined to a point within the United States. None of them is transported "for beverage purposes" within the United States, or territory subject to its jurisdiction. The possession which is lawful in the steamship when it crosses the three-mile limit, marking the territorial waters of the United States, continues to be lawful throughout the duration of its presence within such waters.

In *United States v. Two Hundred and Fifty-Four Bottles of Intoxicating Liquor*, 281 Fed., 247 (1922), a libel of information was filed on behalf of the Govern-

ment to forfeit certain liquors brought into the port of Galveston on a vessel owned by and operated for the account of the United States Shipping Board Emergency Fleet Corporation. The master of the vessel filed a claim for the liquor, asserting that he had the legal right to possess liquor aboard his vessel outside of the three-mile limit, and that, by manifesting the said liquor as "ship's stores," he had relieved himself of the operation of the National Prohibition Act while in the harbor.

HUTCHINSON, D. J., said:

"If the possession of the liquors by the captain was unlawful prior to his entering the harbor, then clearly the manifest of them cannot relieve the illegality; while, if that possession was lawful, I think it equally clear that though goods not capable of importation are not required to be manifested under Section 2809, Revised Statutes being Comp. St. §5506 (see opinion this day filed in *United States v. Thirty-Six Cases of Intoxicating Liquor, etc.*, 281 Fed., 243), the captain could have reported these liquors under Rev. Stat. §2774 (Comp. St. §5470) and saved their forfeiture.

"This being so, I am not impressed with the argument of the government that the manifesting of the liquors as 'ship's stores,' even though they were not such, would convert a lawful into an unlawful possession, since the manifest of articles lawfully held on the high seas, but not capable of importation into the United States, has but one purpose, that of disclosure or surrender to the custody of the customs officers of the articles while in port. Such purpose is effectually served by the report or manifest of the articles no matter under what name or in what way reported.

"In what is said it is not meant to at all discuss the effect of a manifest of excessive sea stores, as these are controlled by different statutes, and the libel in this case does not present that question for review. *It is merely meant to hold that, from the standpoint of the prohibition laws, a legal possession on the high seas remains*



*a legal possession in the port, if the liquors, during the time the ship is in port, are properly reported and surrendered to the customs officers for sealing and custody."* (Italics ours.)

The Amendment does not make mere possession of intoxicating liquors unlawful. Its prohibition applies only when one lawfully in possession when the Amendment took effect seeks to sell or transport it within the United States, etc., or to export it therefrom, for beverage purposes. If the National Prohibition Act goes beyond this, it exceeds the authority conferred upon Congress by the Amendment. We do not construe it as going beyond the Amendment. The Act, recognizing the lawfulness of possession of liquors in a private dwelling, makes possession elsewhere only *prima facie* evidence that it is possessed for an unlawful purpose, and this evidence, of course, is open to rebuttal by the facts of the case.

In the case of *Corneli v. Moore*, 257 U. S., 491 (decided January 30, 1922), permission to remove liquor by Corneli from a bonded warehouse in which he had stored them prior to the enactment of the Prohibition Act, to a private home, was refused, on the ground that he did not have lawful "control, access to or possession" of the spirits in such warehouse, and that the "transportation" would necessarily precede arrival of the liquors at a place where the same might be lawfully "owned, possessed," etc.

Mr. Justice McKenna, in delivering the opinion of the Court, distinguished the case from the decision in the *Street* case (254 U. S., 88), saying (p. 497):

"There is no analogy in *Street's* relation to the room in the Deposit Company's warehouse and appellant's relation to the bonded warehouses. They (the appellants) had neither control, access to or possession of the spirits they purchased. Mere ownership was not the equivalent. Under Section

33, there must be ownership and possession in one's private dwelling, and that character cannot be assigned to bonded warehouses of the government."

The actual basis of this decision is stated by Mr. Justice HOLMES in the *Grogan* case (42 Sup. Ct. Rep., 423, 424), as follows:

"*Street v. Lincoln Safe Deposit Co.*, 254 U. S., 88, \* \* \* was decided on the ground that the liquors were in the strictest sense in the possession of the owner \* \* \* , and that to move them from the warehouse to the dwelling was no more transportation in the sense of the statute than to take them from the cellar to the dining room; whereas in *Corneli v. Moore* \* \* \* they were not in the owner's possession and required delivery and transportation to become so."

In the cases at bar, the liquors are in the strictest sense in the lawful possession of the owners of the steamships, and they remain immovable within the ship as a part of its sea stores, in effect as a part of the ship, in the same sense in which a cable which had been bought in Liverpool by the master of an American vessel to replace an old one worn out was held to be a part of the ship and not to be treated as imported goods, wares or merchandise, in the case of *U. S. v. A Chain Cable*, 2 Sumner, 362, Fed. Cas. 14,776 (Cir. Ct., D. Mass., 1836), cited in the case of *The Conqueror* (*supra*).

The movement of these liquors within our territorial waters moreover can in no proper sense be deemed a "transportation" in any accepted sense of the word. The universal and practical conception of transportation as applied to any article or commodity under any circumstances presupposes a carrier of some kind or description separate and distinct from the article or thing transported.

As was said in the case of *Gloucester Ferry Co. v.*

*Pennsylvania*, 114 U. S., 196 (1884), by Mr. Justice FIELD, at page 203:

“Transportation implies the taking up of persons or property at some point and putting them down at another.”

In the present case there is not any separation of the Sea Stores from the ship. They are not set down at any point. They are acquired and taken on board for the purpose of consumption on board. They are incorporated as it were into the body of the ship. Properly considered, Sea Stores are really aids to transportation, rather than the subject matter thereof. While, of course, all parts of the vessel, including masts, spars, tackle and apparel, as well as sea stores, necessarily move with her when she moves they are not being transported in the sense of that word as understood by our statutes or case law. It is submitted that the transportation prohibited by the Eighteenth Amendment and the National Prohibition Act is transportation in a commercial sense. Undoubtedly this was present in both the *Grogan* and *Anchor Lines* cases. In both of these cases there was a definite consignor and consignee and a movement from one to another over the territory of the United States. The liquor was ordinary merchandise and the very subject matter of the transportation. The vehicles of transportation were entirely separate and distinct from this subject matter and their use was invoked for the sole and express purpose of effecting the movement of the intoxicating liquor in question. Nor can it be fairly contended that the consumption of these liquors by the passengers and crew upon the high seas constitutes a delivery of the latter within the ordinary meaning of the term. There is no real analogy in the argument advanced by Judge HAND in his effort to bring the movement of these sea stores within the accepted definition of transportation as laid down in the *Gloucester Ferry* case (*supra*). The substantial basis for distinguishing this movement,

however, from that involved in the *Grogan* and *Anchor Line* decisions is found in a consideration of the National Prohibition Act in its entirety. Specific reference to the question of transportation is found in Sections 13 and 14 of Title II of the Act, and here Congress considers the question in some detail by requiring the carriers to mark the consignors and consignees names on the outside of all packages in addition to making clear the contents thereof. While it is true, as said by Judge HAND, that a regulation of this kind of transportation does not necessarily impute to the word itself any of the conditions which it enacts, it is an even more reasonable supposition to assume that this specific and detailed reference to transportation manifested the congressional conception of the term as being used in the ordinary commercial sense, and it is submitted that the movement of these sea stores of liquors within our territorial waters can in no way be fairly construed to fall within that definition. Under the *Street* case (*supra*) the conveyance from warehouse to residence was held not to be transportation with the Act, because the goods were in the owner's possession in a leased room in a warehouse, and in effect merely transferred by him to his residence. In the *Corneli* case (*supra*) a different result was reached because the goods were in possession of the warehouse, and the transfer thereof involved commercial transportation of and delivery to the owner at the latter's residence. Sea stores, like bunker coal, belonged to the ship owner and are on board his vessel solely for consumption therein. They are not received from any shipper nor are they to be delivered to any consignee, and transportation is *not* the purpose of their presence on shipboard. They are brought within the territorial waters of the United States merely because it is unavoidable under the circumstances.

It is submitted, moreover, that the mere possession of intoxicating liquors is not prohibited by the Eighteenth Amendment. If the National Prohibition Act goes beyond the limits of that Amendment, and prohibits

mere possession, it is unsupported by the Constitution, and, to that extent at least, unenforceable. But while the language of Section 3, Title II, does prohibit any person to "possess any intoxicating liquor except as authorized in this act," read in connection with Section 33, Title II, such unauthorized possession would appear only to be *prima facie* evidence of possession for one of the illegal purposes prescribed in the act, and not in and of itself to be punishable. That this construction is correct is emphasized by the provisions of Section 20, Title III, where the congressional intention clearly expressed with respect to the Canal Zone is to make possession in and of itself a crime, as also to prohibit, not only the technical "importation" into the Zone, but the introduction of liquor into that specific territory. Not only, too, is possession prohibited, but it is made a crime to have "under one's control within the Canal Zone" any of the specified beverages. So, a man in the position of Corneli in 257 U. S., 491, who had liquor stored in a bonded warehouse, and adjudged by this Court not to have possession, but who undoubtedly had control in the sense of having title and—except for the Act—right to possession, if in the Canal Zone, would probably be held to violate the act.

If it be suggested that the Prohibition Act, Section 33, Title II, makes the possession of liquors by any person not legally permitted by the provisions of the statute to possess liquor, evidence that such liquor is kept for purposes prohibited by the statute, the answer is that it is only *prima facie* evidence of that fact. In the *Street* case, Justice CLARKE dealt with this situation as follows (p. 94):

"Assuming that the unexplained presence of the liquors in the Company's warehouse would give rise to the prescribed presumption, yet, if that presumption should be rebutted by appropriate testimony (as it is in this case by admissions) that the liquor to which it is applied is not being kept

for the purpose of sale, barter, exchange, furnishing or otherwise disposing of it in violation of the provisions of the title, the implication is plain that the possession should be considered not unlawful, even though it be by a 'person not legally permitted,'—that is by a person not holding a technical permit to possess it, such as is provided for in the act."

And the Court goes on to say (p. 94):

"Without saying that there may not be other cases, the one at bar seems to be fairly within the scope of this obvious implication of Section 33.

"It may be that the custody of liquors by the Warehouse Company was thus not declared to be unlawful because the writers of the act did not have such a case in mind, but it was more probable because Congress would not consent to allow lawful possession and use of liquors in dwellings having storage facilities for them, while denying the only possible means of preserving and protecting such liquors to persons with less commodious homes. Congress was concerned with the great problem of preventing the manufacture and sale of intoxicating liquors for beverage purposes in the future, and it seems to have given but slight attention to the consumption of such relatively small amounts of such liquors as might be in existence in private ownership and intended for consumption by the owner, his family or his guests, when the amendment of the act should take effect.

*"An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law which have ample field for other operation in effecting a purpose clearly indicated and declared."*  
(Italics ours.)

It is our contention that the cases of liquor carried as part of ship stores in foreign merchant vessels, also fairly fall within the obvious implication of Section 33 of Title II, and that an intention to confiscate the private

property in these liquors and to extend the jurisdiction of an act which is in the most emphatic sense of the term, a domestic police regulation, over the internal concerns of foreign ships, and thus indirectly to foist our laws and our conception of the proper use of alcohol for beverage purposes, over the people of other nations whose usages and laws differ from ours, has not been expressed by the Eighteenth Amendment nor by Congress.

## VI.

### Summary of Argument.

Summing up, therefore, it is our contention that although the Amendment and the Act by their terms apply to the United States and all territory subject to its jurisdiction, those words in and by themselves do not operate to constitute regulations of the internal affairs of foreign merchant vessels coming within our waters; that immemorial usage has established the right of such vessels to bring within our jurisdiction as a part of the stores or supplies for the use of passengers and crew on their voyage, certain alcoholic beverages; that something more than the enactments now on the statute books would be required to prohibit continuance of that custom; that the mere possession of liquor on board a ship, lawful in its inception, does not become unlawful the moment the ship crosses the three-mile limit into our territorial waters; that the continuance of these liquors on board the ship while in our waters, on her progress from the three-mile limit to her dock and return, is not transportation within the meaning of that word as it is used in the Amendment and the Prohibition Act; and that for these reasons, the judgment of the District Court should be reversed, and the defendants enjoined from interfering with the continuance of the customs and practices in this regard pursued by vessels of foreign registry.

GEORGE W. WICKERSHAM,  
*Counsel for Appellants.*

**Opinion Referred to in Treasury Decision 38218 of  
Attorney General Palmer to the Secretary of the  
Treasury, Dated January 23, 1920.**

“Department of Justice  
January 23, 1920.

“Dear Mr. Secretary:

“I have the honor to acknowledge receipt of your letter of January 20th, enclosing a letter from the Secretary of State with a communication from the Italian Embassy regarding instructions given to Collectors of Customs in Treasury Decision No. 38218 of December 11, 1919, requiring that all liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose. You ask my opinion upon the following questions:

1. Are the instructions mentioned and the practice of the Customs Officers in accordance therewith authorized under the law?
2. If permissible in part but not in their entirety, to what extent should they be modified to meet legal requirements and to restrain as far as possible the prevalent practice of smuggling liquor from vessels in ports of the United States?
3. Should there be any difference in practice as between American and foreign vessels in such matters?

“With respect to American vessels it is sufficient to say that the Prohibition Law applies as well on board such vessels while in American ports as at any other point within the United States. As to such vessels I do not think the validity of the regulation mentioned can be successfully questioned.



"The status of foreign vessels in American ports however, is somewhat different. I think the state of International Law on the subject of private vessels in foreign ports is, generally speaking, this:

"So far as regards acts done at sea before her arrival in port and acts done on board in port, by members of the crew to one another, and so far as regards the general regulation of the rights and duties of those belonging on board, the vessel is exempt from local jurisdiction but, if the acts done on board affect the peace of the country in whose port she lies, or the persons or property of its subjects, to that extent that state has jurisdiction (Moore's International Law Digest, Vol. II, page 297).

"The Complaint made against the Treasury Decision mentioned is that by requiring liquors properly listed as sea stores to be kept under seal during the time such vessels are in American ports it prevents the distribution to the crews of the usual amount for daily consumption, which in the case of Italian vessels it is said is required by the contracts with the crew.

"I agree entirely that excessive or surplus liquor stores are subject to seizure and forfeiture, but I am not prepared to say that the daily distribution to the crew of the usual quantity for consumption on board the ship so affects the peace of this country that American officials are authorized to interfere. Of course, the bringing of such liquors on shore, even by the members of the crew to whom they are issued, will be unlawful and subject the offender to prosecution, but so long as the liquors on board are properly listed as sea stores, and are not excessive in quantity I do not think their daily distribution on board the ship can properly be interfered with by the Government.

"I am therefore of opinion that the regulations should be modified to the extent above indicated.

Respectfully,

A. MITCHELL PALMER,  
Attorney General

To the Secretary of the Treasury."

## Opinion of General Counsel of Shipping Board.

"June 13th, 1922.

"Honorable A. D. Lasker,  
Chairman, U. S. Shipping Board,  
Washington, D. C.

"My dear Mr. Lasker:

"You have requested from me an opinion as to the right of American vessels, including those operated by the Shipping Board, to sell liquor outside of the three mile limit. In my opinion neither the Eighteenth Amendment nor the Volstead Law applies to American ships outside the three mile limit, and therefore, in my opinion liquor may be sold on all American ships, including Shipping Board ships, outside the three mile limit.

"The Eighteenth Amendment provides that

'the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.'

"The question narrows itself down to the legal interpretation of the words, as used in the amendment, 'all territory subject to the jurisdiction thereof.' Is an American ship, outside of the three mile limit, *'territory subject to the jurisdiction of the United States'*, in the sense that those words are used in the Eighteenth Amendment? It has long been an established rule of construction that, as Chief Justice WAITE says in *Tennessee v. Whitworth*, 117 U. S., 139:

'Words in a Constitution as well as words in a statute are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary.'

"It has again been said in the article on constitutional construction in 10 Fed. Stat. Annot., pages 275, 276:

'Words in the Constitution \* \* \* are to be taken in the sense in which they were used and understood by common law and at the time the Constitution and the amendments were adopted.'

"The word 'territory' at the time of the adoption of the Eighteenth Amendment had a clear and well defined legal meaning. The prior use of the word 'territory' in the Constitution appears in Section 3 of Article 4, which provides as follows:

'The Congress shall have power to dispose of and make all needful rules and regulations respecting the *territory* or other property, belonging to the United States.'

"This article of the Constitution came before the Supreme Court of the United States for construction in *U. S. v. Gratiot*, 14 Peters 526. Mr. Justice THOMPSON, in delivering the unanimous opinion of the Court there defined the meaning of the word 'territory' as follows:

'The Constitution of the United States (Article 4, Section 3) provides: "That Congress shall have power to dispose of and make all needful rules and regulations respecting the *territory* or other property belonging to the United States." The term *territory*, as here used, is merely descriptive of one kind of property and is equivalent to the word *lands*!'

"As used in statutes of the United States, the word 'territory' has been defined in at least four cases as a place, subject to the jurisdiction of the United States, which has an organized government with an executive, legislative and judicial system; and lands subject to the jurisdiction of the United States, which have no such organized government have been held not to be territories. *Kopel v. Bingham*, 211 U. S., 468; *Ex parte Morgan*, 20

Fed. Rep., 298; *in re Lane*, 135 U. S., 443; *Brunswick First National Bank v. Yankton County*, 101 U. S., 133.

"But finally, as if to make it plain beyond controversy that the amendment was dealing with territorial limits in a legal sense, Congress, in proposing the amendment, avoided the use of the wider language which had been embodied in the Thirteenth Amendment prohibiting slavery 'within the United States or *any place* subject to their jurisdiction,' and used the narrower, clearly defined terms 'territory subject to the jurisdiction of the United States.' It had previously been decided that there were 'places' even on land that were subject to the jurisdiction of the United States which were not 'territory.' *In re Lane*, 135 U. S., 43; *Ex parte Morgan*, 20 Fed. Rep., 298; *Kopel v. Bingham*, 211 U. S., 468.

"And in the National Prohibition cases recently decided, 253 U. S., 350; the Supreme Court held that prohibition 'is operative throughout the *entire territorial limits* of the United States.' The words 'territorial limits' are words of limitation; they indicate the boundaries within which the prohibition lies. 'Territorial limits' plainly means the limits of lands; 'territorial limits' do not extend into or over the high seas.

"A careful construction of the amendment itself conclusively bears out this construction. The amendment reads:

"the manufacture, sale, or transportation of intoxicating liquors within, *the importation thereof into, or the exportation thereof from* the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.'

"It would be a grotesque use of terms to speak of importing or exporting beverages into a ship on the high seas or from a ship on the high seas.

"Finally, it seems to me the case of *Scharrenberg v. Dollar Steamship Company*, 245 U. S., 122, is conclusive

of the question. In that case an Act of Congress made it a misdemeanor for any corporation in any way to assist or encourage the importation or migration of any contract laborer or contract laborers *into the United States*, and a contract laborer was by the statute defined as 'one who comes to perform labor *in this country*.' The Supreme Court held, to quote from the syllabus:

*'An American ship engaged in foreign commerce is not a part of the territory of the United States in the sense that seamen employed upon her while in American ports or on voyages can be said to be performing labor in this country within the meaning of the statutory provisions above cited.'*

and that

'Inducing and assisting aliens to come from abroad, working as seamen on the way, for bona fide service as seamen on an American ship during her voyage from American ports to foreign countries and while she lies in such ports preparatory to or in the course of such voyage, is not an assisting or encouraging of the importation or migration of alien "contract laborers" *into the United States*.'

"And the Supreme Court said on page 127:

*'Equally unallowable is the contention that a ship of American registry engaged in foreign commerce is a part of the territory of the United States in such a sense that men employed on it can be said to be laboring "in the United States" or "performing labor in this country." It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative (International Law Digest, Moore, Vol. I, par. 174), and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible.'*

"Acting Attorney General Frierson, in rendering his opinion on November 1, 1920, wholly fails to take this distinction into account, and by reason thereof arrives at an erroneous conclusion, and the two cases cited by him, in view of the special circumstances in those two cases, in no way bears out his contention.

"Furthermore, it is a century old principle of International Law that ships are not territory in an actual sense, because for example:

- (a) They are subject to the jurisdiction of local authorities in foreign waters for the punishment of crimes committed on board in such waters.
- (b) Neutral merchant ships may be seized on high seas and condemned by belligerents for carrying contraband of war.
- (c) They may be seized, attached and sold under process in rem for claims in tort, or for debt, in our own or in a foreign country.
- (d) Political refugees may be removed from them when they are in foreign waters; there is no right of asylum on merchant ships for such persons; II Moore's International Law Digest, 855, 858. *Wildenhus's Case*, 120 U. S., 1.

If they were actually territorial

- (a) No person could be seized or punished by a foreign nation for a crime committed within the actual territorial limits of the United States.
- (b) No part of the actual territory of the United States can be seized or proceeded against by a foreign power for unlawful acts committed within such territory, complaint in respect of all such matters must be made to the sovereign.

- (c) Actual territory can neither be seized, attached nor sold under process in rem or other process, for claims in tort or for debt; claims against any part of the national territory must be presented to the sovereign.
- (d) There would be a right of asylum on board of them for political refugees; such refugees are protected within the actual territory of the United States.

"As a matter of fact, according to Italian law, it is necessary for a steamship company to furnish each member of its crew with a stipulated daily allowance of wine. Treasury decision No. 38,218 was promulgated on December 11, 1919, and required that all liquors, which are prohibited importation, but which are properly listed as sea stores on vessels arriving in the ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, and that, no part thereof can be removed from under seal for use by the crew at meals or for any other purpose. The Italian Embassy appealed to our State Department for relief from this treasury regulation, and in an opinion rendered January 23, 1920, Attorney General Palmer himself rendered an opinion to the Secretary of State that

'So long as the liquors on board are properly listed as sea stores and are not excessive in quantity, I do not think their daily distribution on board the (Italian) ship can properly be interfered with by this government. I am, therefore, of the opinion that the regulation should be modified in the case above indicated.'

And in the same opinion the Attorney General states:

'With respect to American vessels it is sufficient to say that the prohibition law applies as well on board such vessels while in American ports

as at any other points within the United States. As to such vessels I do not think that the validity of the regulations mentioned can be successfully questioned.'

"By implication this opinion of the Attorney General limits the enforcement of the Prohibition Act to American ships while in port, and the Treasury regulation itself has the same effect and in no way covers or attempts to cover the sale of liquors on American vessels while they are outside of the three mile limit.

"The Volstead Act itself contains no reference to the territorial limitations within which it shall be operative, and it follows axiomatically, of course, that it cannot extend beyond the limits defined by the Eighteenth Amendment, and that if the amendment itself does not apply to American ships beyond the three mile limit, the Volstead Act itself cannot do so.

"For these and other reasons which I will not here detail at length, I am of the foregoing opinion.

"I hereby confirm the oral opinion which I rendered to you and the United States Shipping Board in July, 1921, after a careful review of the authorities. A further review just made, because of certain letters you have just received, does not indicate any reasons to cause me to change my opinion that the law is not being violated.

Very truly yours,

(Signed) ELMER SCHLESINGER,  
General Counsel."



**Opinion of Attorney General Daugherty, Dated  
October 6, 1922.**

"Oct. 6, 1922.

"My Dear Mr. Secretary:

"Acknowledgment is made of the receipt of your letter of June 23, 1922, in which you enclosed an opinion of the general counsel of the Shipping Board, holding that the Eighteenth Amendment does not apply to American ships on the high seas and stating that in conformity with said opinion liquor is being furnished for beverage purposes on Shipping Board vessels outside the territorial waters of the United States.

"You suggest a reconsideration of the rulings of this department, particularly the opinion of Nov. 1, 1920, relating to the application of the National Prohibition act to American ships on the high seas and request advice from this department whether the practice of selling liquors on American ships outside the territorial waters of the United States is permissible under the law.

"You further request this department to advise you whether under our interpretation of the law and the decisions in *Grogan v. Walker* and *Anchor Line v. Aldridge*, cases decided by the United States Supreme Court, May 15, 1922, the sale, transportation or possession of intoxicating liquor for beverage purposes on foreign vessels while in American waters is prohibited.

"My answer to the first question is in the negative for the following reasons:

"The Eighteenth Amendment to the Constitution of the United States provides:

'The manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.'

"The fundamental consideration then, upon which the answer to your first query rests, is whether United States ships while on the high seas fall under the legal interpretation of the phrase,

'the United States and all territory subject to the jurisdiction thereof.'

"To arrive at the correct legal interpretation of any constitutional provision, it is necessary to:

'Read it in the light \* \* \* of the context \* \* \* and the subject with which the amendment dealt and the purpose which it was intended to accomplish \* \* \* .' (Chief Justice WHITE, concurring in the National Prohibition cases, 350 U. S. 350-390).

"The purpose or intent of the States in adopting the Eighteenth Amendment and that of the legislative body in initiating it, must be considered in the light of 'the mischief to be prevented' (*Craig v. Missouri*, 4 Pet. 410, 431), the subject, the context and the intention of the body inserting the word in the Constitution (*McCulloch v. Maryland*, 4 Wheat. 316), 'all the aids and lights of contemporary history' (*Kendall v. United States ex rel Stokes*, 12 Pet. 524), 'in connection with the known condition of affairs out of which the occasion for its adopting may have arisen \* \* \* in a way, so far as is reasonably possible to forward the known purpose or object for which the amendment was adopted' (*Maxwell v. Dow*, 176 U. S. 581).

"The mischief to be prevented in prohibition enactments has been construed as the use of intoxicating liquor as a beverage (see *Crane v. Campbell*, 245 U. S. 304). A glance at contemporary history and the conditions of affairs out of which the adoption of the Eighteenth Amendment arose compels the admission that it represents the culmination of fifty years' struggle of

the American people to effectively settle the problems arising from the use of intoxicating liquor as a beverage. Beginning by county, and State by State, the area wherein the manufacture, sale and possession of intoxicants were made illegal grew until by the ratification by forty-five of the forty-eight States of the Union an amendment affirming and extending such prohibition was added to our Federal Constitution. To hold that the intent of Congress in proposing the wording of the amendment, and of the States in ratifying it, was anything less than to extend its inhibitions where the judicial arm of this Government extended for any purposes, is to fail to apply all the rules the Supreme Court has laid down for arriving at the intent of constitutional enactments.

"The terms 'all territory subject to the jurisdiction thereof,' expresses not a limitation just to lands, as the word territory might alone be construed, but rather an extension wherever the jurisdiction of the United States may reach.

"Certainly Shipping Board vessels operated and owned by our very Government itself are 'subject to the jurisdiction thereof.' Because of their ownership by the Government they would, in a double sense, be subject to the restrictions of the Eighteenth Amendment. But every American vessel is for some purpose regarded as a part of American territory and our laws are the rules for its guidance. (*The Scotia*, 14 Wall. 170, 184).

'It is often stated that a ship on the high seas constitutes a part of the territory of the nation whose flag it flies. In the physical sense this phrase obviously is metaphorical. In the legal sense it means that a ship on the high seas is subject to the exclusive jurisdiction of the nation to which, or to whose citizens, it belongs. The jurisdiction is *quasi territorial*.' (Moore's International Law Digest, vol. 1, p. 930; *U. S. v. Rodgers*, 150 U. S. 249).

"Our diplomatic correspondence and the opinions of the courts have uniformly considered that insofar as the restraining and protecting jurisdiction of our Government is concerned, American ships, whether owned by the Government or by private citizens or corporations, are in many respects territory of the United States. Some interesting observations in this connection are:

"In the case of *United States v. Rodgers*, 150 U. S., 249, it is said:

'A vessel is deemed part of the territory of the country to which she belongs.'

"In the case of *Crapo v. Kelly*, 16 Wall. 610, the Supreme Court said:

'The question then arises, while thus upon the high seas was she in law within the territory of Massachusetts? \* \* \* This (the Constitution) gives the power to the courts of the United States to try those cases in which are involved questions arising out of maritime affairs and of crimes committed on the high seas.'

"In *Lindstrom v. International Navigation Company*, 177 Fed. 170, the Court said:

'The St. Paul is an American vessel, registered at the Port of New York, and when she was on the high seas was a part of the territory of the State of New York, hence all civil rights of action for matters occurring aboard of her at sea are determined by the laws of that State.' (*McDonald v. Mallory*, 77 N. Y. 546, 33 American Reports, 664; *The Lamington* (D. C.), 87 Fed. 752; *St. Clair v. United States*, 154 U. S. 152, 38, L. ed. 936.)

"Mr. Blaine, Secretary of State, in a letter to Mr. Ryan, Minister to Mexico, Nov. 27, 1889 (set forth in Moore's Law Digest, vol. 1, p. 931), says:

'Merchant vessels on the high seas, being constructively considered as for most purposes a part

of the territory of the nation to which they belong, they are not subject to the criminal laws and processes of another nation.'

"Mr. Webster, as Secretary of State, spoke for this Government in his letter to Lord Ashburton, August, 1842, as follows:

'It is natural to consider the vessels of a nation as a part of its territory, though at sea, as the State retains its jurisdiction over them and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. \* \* \* It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless be answerable to the laws of the place \* \* \* but, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be, for the general purpose of governing and regulating the rights, duties and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself.' (Webster's Works, Vol. 6, pp. 306, 307).

"This case was cited with approval by the United States Supreme Court in the case of *United States v. Rodgers* (*supra*).

"In the case of *St. Clair v. United States*, 154 U. S., 134, 152, the Court held:

'A vessel registered as a vessel of the United States, is, in many respects, considered as a portion of its territory, and "persons on board are protected and governed by the laws of the country to which the vessel belongs."'

"Ships are 'territory' in a constructive rather than an actual sense. The distinction is clearly shown by Justice FIELD in *United States v. Smiley*, 6 Sawyer, 640, 645:

'The criminal jurisdiction of the government of the United States is \* \* \* limited to their own territory, actual or constructive. \* \* \* The constructive territory \* \* \* embraces vessels sailing under their flag; wherever they go they carry the laws of their country, and for a violation of them their officers and men may be subjected to punishment.'

"Great stress is laid on the argument that the word 'territory' in the Eighteenth Amendment must be construed the same as it was in its use in Article IV, Section 3, of the Constitution, and the case of *United States v. Gratiot*, 14 Pet., 526, is cited to show a construction synonymous with the word 'lands.' But that the same construction must be given the same word when used in an entirely different context does not follow (*Cherokee Nation v. Georgia*, 5 Pet., 1). Furthermore, the definition of the word 'territory' in the *Gratiot* cases (*supra*) is specifically restricted in its application to the use in Article IV, since the Supreme Court says they interpret the word 'territory' only 'as here used.' It there referred undoubtedly only to lands, because Article IV, Section 3, was placed in the Constitution to give the Federal Government authority over the Western territory claimed by States under their conflicting sea to sea grants. (See debates in the Constitutional Convention and Watson on the Constitution, Vol. 21, p. 1255.)

"The construction of the word 'territory' in the fourth article of the Constitution to mean lands is in complete harmony with the intent of the framers of that article of the Constitution. I believe from the study of the history of conditions out of which the Eighteenth Amendment grew, it is equally clear that the words 'territory subject to the jurisdiction' of the United States carry the intent to extend its provisions over every spot where the flag of America flies.

"This intent is a living part of the Eighteenth Amendment and the National Prohibition act, for as Justice BROWN has said in *Hawaii v. Mankichi*, 190 U. S., 197, 212:

"Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intention of the law-making power will prevail, even against the letter of the statute; or, as tersely expressed by Mr. Justice SWAYNE in *Smythe v. Fiske*, 23 Wall. 374, 380: "A thing may be within the letter of a statute and not within its meaning, *and within its meaning, though not within its letter.* THE INTENTION OF THE LAW MAKER IS THE LAW." A parallel expression is found in the opinion of Mr. Chief Justice THOMPSON of the Supreme Court of the State of New York (subsequently Mr. Justice THOMPSON of this Court) in *People v. Utica Insurance Company*, 15 Johns, 358, 381: "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers."

"It is urged that acts passed under Article I, Section 8, Clause 10 of the Constitution, all carry the express provision that they shall apply on the high seas, whereas

the National Prohibition act does not contain such plain extension. But the difference between the two provisions of the Constitution by authority of which the laws emanate is material. Article 1, Section 8, Clause 10, gives Congress power to define and punish piracies and felonies committed on the high seas, which offenses by their nature had formerly remained solely in the power of the States to handle. Article 1 of the Constitution prohibited nothing, nor did it define an offense. Of course, therefore, it was necessary for the act of Congress to define the offense, provide for its punishment and make provision as to its jurisdiction, since all the regulatory power lay in the Congressional enactment, not in the Constitutional provision. The Eighteenth Amendment is quite different.

"It is really a law itself, as well as a declaration of an organic Constitutional principle. From its terms alone flows the real prohibition. Palpably, therefore, since by the force of the amendment prohibition is carried everywhere within the confines of the sovereignty of the United States, the National Prohibition act passed to facilitate its enforcement and punish its violation would be co-extensive therewith.

"The Thirteenth Amendment is simliar. It, too, names a new prohibition and states the extent of its application. Enactments resulting from it do not carry specific provision for their application to offenses committed on the high seas, and yet no one would advance the theory that because of that fact slavery might be permitted on American ships while on the high seas. (See Section 268, Penal Code, also the Peonage Sections 269, 270, 271, P. C.)

"Concerning the self-execution effect of the provisions of the Thirteenth Amendment, the observation of Mr. Justice BRADLEY in the *Civil Rights* cases, 109 U. S., 3,



20, is interesting in the light of its applicability also to the effect of the Eighteenth Amendment:

'This Amendment, as well as the 14th, is undoubtedly self-executing without any ancillary legislation so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect, it abolished slavery and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit.'

"Another illustration of the application of a provision of the Constitution and laws passed pursuant to it to the high seas, even though there is no specific reference to the high seas, is found in Article 3, Section 3, Clause 1 of the Constitution, defining treason. It does not indicate the territorial scope of its application, nor do the acts of Congress passed to enforce it, but in the *United States v. Greathouse*, 4 Savoy, 457, it was held that the purchase and fitting up of a vessel with arms in furtherance of a design to commit hostilities on the high seas constituted treason. (See also *Hawaii v. Mankichi*, 190 U. S., 197.)

"Section 37 of the Penal Code and other general statutes of the United States having by their terms no specific extension to the high seas have been held to extend to violations committed on American vessels outside of American waters.

"The same rule has been applied in cases of extradition; for instance, where the treaty has provided that persons will be surrendered who commit crimes within the jurisdiction of the demanding country, the word 'jurisdiction' has been held to cover vessels on the high seas. (Moore on Extradition, Vol. 1, p. 135, Sec. 104, Vogt. 14, Op., A. G., 281; Wharton's State Trials, pp. 392, 403, 404; Beale's Cases on Conflict of Laws, Sec. 22, p. 506.)

"Vessels are taxable as personal property at their home port, although they are actually on the high seas, and have never in fact come within the jurisdiction of the home port (*People ex rel The Pacific Mail S. S. Co. v. Commissioner of Taxes, etc.*, 58 N. Y., 242; *Olson v. San Francisco*, 82 Pac., 850). Similarly, the pilotage laws (*Wilson v. McNamee*, 102 U. S., 572, 574) and the laws concerning assignment (*Crapo v. Kelly*, 16 Wall, 610) have such extended operation. It is a recognized principle of law that the State has general civil jurisdiction over vessels registered at her ports, even where the cause of action arises on the high seas (*Wilson v. McNamee*, 102 U. S., 572; *Manchester v. Commissioner of Mass.*, 139 U. S., 240; *Crapo v. Kelly (supra)*; *Old Dominion Steamship v. Gilmore*, 207 U. S., 398, 403). In the *Old Dominion Steamship Company* case, Mr. Justice HOLMES in delivering the opinion of the Court, said:

"In short, the bare fact of the parties being outside the territory in a place belonging to no other sovereign, would not limit the authority of the State, as accepted by civilized theory. No one doubts the power of England or France to govern their own ships on the high seas."

"The open oceans, outside the territorial waters of nations, have long been regarded as the highway of all, wherein all the nations share the privileges of tenants in common. If, then, the United States shares the high seas as a tenant in common with other nations of the world, the Eighteenth Amendment would be broad enough to comprehend the sea as territory of the United States in so far as and where, and when, it is used by American bottoms.

"In an early English case, the *King against Brizae and Scott*, 4 East Term Reports, 164, it is held that 'an information for conspiracy \* \* \* for planning and fabricating false vouchers to cheat the Crown, which

planning and fabricating were done on the high seas, is well triable in Middlesex.' (Quoting from the head note.)

"In Corpus Juris, Vol. XVI, under the heading Criminal Law, p. 169, par. 216, it is said:

'In the absence of a statute the courts of a country have no jurisdiction of an offense committed on the high seas except in the case of piracy, *unless the offense is committed on board a ship belonging to that country.*' (Italics ours.)

"An examination of the National Prohibition act, by itself, leads to the conclusion that its operation is extended to American vessels on the high seas, since its terms are absolutely general and have no limits of any sort. The only objection is that crimes on the high seas are all dealt with in Chapters 11 and 12 of the Criminal Code, but the peculiar language of the relevant section, 272, Penal Code, is significant. All it says is that the crimes and offenses named in the chapter shall be punished when committed on the high seas. It then lists certain ordinary common law offenses such as murder, over which, of course, the Federal Government would not ordinarily by virtue of its limited powers have any jurisdiction whatsoever. There is no intimation in Section 272 that no other crimes and offenses except those defined in Chapter 11 shall be punished when committed on American vessels on the high seas, and especially is there no suggestion that offenses which violate the avowed constitutional policy of the Federal Government itself shall be so exempted from punishment. On the contrary, the grant in Section 2 of the Eighteenth Amendment of concurrent power to the States and to the Federal Government to enforce the provisions of Section 1 thereof would justify the reasonable conclusion that the Federal enactment passed pursuant thereto reached to the jurisdictional limits of other Federal laws. The provisions of the criminal code generally apply to the same

territory over which the judicial code gives jurisdiction to the United States courts, and Section 41 of the judicial code, provides:

'The trial of all offenses committed upon the high seas, \* \* \* shall be in the district where the offender is found, or into which he is first brought.' (See *Pedersen et al. v. United States*, 271 Fed., 187.)

"The Shipping Board has frequently sought to punish offenses committed against its property on the high seas by maintaining the applicability of general criminal statutes such as Section 37 and Section 35 of the Penal Code of the United States to crimes committed on the high seas (see *United States v. Hawkins*, So. Dist. of New York, also *United States v. Bowman et al.*, now pending in the Supreme Court of the United States, Docket 69). It would be inconsistent for American vessels to enjoy the protection of the laws of general jurisdiction and fail to be governed by the prohibitions of one of similar jurisdiction.

"In the case of *United States v. 254 Bottles of Intoxicating Liquors*, Southern District of Texas, May 4, 1922, the Court announces that the 'sole question for decision is, had the master the right to possession of the goods on board ship (of United States) on the high seas and was this possession in violation of the National Prohibition act?' And then holds that such possession was a violation of the law, for which the stores were forfeitable and the owner liable to punishment.

"The case of *Scharrenberg v. Dollar Steamship Company*, 245 U. S., 122, is greatly relied upon by shipping interests as authority that an American ship is not in any sense a part of the territory of the United States. It was a case based on an alleged violation of an act of Congress by which it was a misdemeanor to assist contract laborers into the United States.

"A contract laborer was defined as one who comes to perform labor in this country. Clearly, the phrases 'into the United States' and 'into this country' are narrower in extent than 'the United States and all territory subject to the jurisdiction thereof.' Had the Eighteenth Amendment stopped after prohibiting the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States, the cases would be similar, but the Eighteenth Amendment goes further and says, 'and all territory subject to the jurisdiction thereof.' We are led inevitably, therefore, to the conclusion that after the prohibition in the United States (which to that point is analogous to the statute considered in the *Dollar Steamship Company* case), the phrase 'and all territory subject to the jurisdiction thereof' was added to extend the scope of the amendment to the very limits of national jurisdiction and sovereignty.

"My answer to your second question is in the affirmative.

"It is a long-established principle of municipal and international law that a nation has the right to make and enforce laws covering its territorial waters as well as its land. In *United States v. Diekelman*, 92 U. S., 520, 525, Mr. Chief Justice WAITE states:

'The merchant vessels of one country visiting the ports of another for the purposes of trade, subject themselves to the laws which govern the port they visit, so long as they remain; \* \* \* (See also Moore's International Law Digest, Vol. II, 275 *et seq.*)

"In 1885 Mr. Bayard, Secretary of State, wrote to the French Minister as follows:

'A foreign merchant vessel going into the port of a foreign State subjects herself to the laws of that State and is bound to conform to its commer-

cial as well as to its police and other regulations during the period of her stay there. "She is as much a *subditia temporanea*," remarks Sir R. Phillimore, with reference to such a case, in the *Queen v. Keyn*, 2 Ex. D., 82, "as the individual who visits the interior of the country for the purposes of pleasure or business." (Moore's International Law Digest, Vol. II, p. 308.)

'It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice MARSHALL in *The Exchange*, 7 Cranch, 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction and the Government to degradation, if such \* \* \* merchants did not owe temporary and local allegiance and were not amendable to the jurisdiction of the country." *United States v. Dickelman*, 92 U. S., 520; 1 Phillimore's Int. Law, 3 D., ed. 483, Section 351; Twiss Law of Nations in Time of Peace, 229, Section 159; Creasy's Int. Law, 167, Section 176; Halleck's Int. Law, 1st ed., 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner or another in a foreign merchant ship. *Regina v. Cunningham*, Bell C. C. 72; S. C. 8, Cox, C. C. 104; *Regina v. Anderson*, 11 Cox, C. C. 198, 204; S. C. L. R., 1 C. C., 161, 165; *Regina v. Keyn*, 13 Cox, C. C. 403, 486, 525, S. C. 2 Ex. Div., 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a Government other than his own, and from which he seeks protection during his stay, he owes that Government such allegiance for the time being as is due for the protection to which he becomes entitled.' (*Wildenhus's Case*, 120 U. S., 1, 12.)

"If, then, the bringing in of liquors by foreign vessels as ship stores or otherwise constitutes a transportation or possession contrary to the Eighteenth Amendment and the National Prohibition act, it is clearly a violation of the law that no executive or administrative officer of the Government has the power to permit.

"The Constitution prohibits transportation which has been defined as 'the taking up of persons or property at some point and putting them down at another' (*Gloucester Ferry Company v. Commissioner of Pa.*, 114 U. S., 196, 203) that the innocence of any intent to 'put them down' or use them in the United States is not material in determining whether the transportation is a violation of the law is determined by the *Walker* and *Anchor Line* cases (*supra*), where the Court decided that intoxicating liquors stored on one British ship could not lawfully be removed to another British ship in the New York harbor, although it was admittedly destined for beverage uses outside the United States.

"Furthermore, the National Prohibition act prohibits possession as well as transportation of intoxicants for beverage purposes, irrespective of where they are to be put to such beverage use. Under the reasoning of the Court in the *Walker* and *Anchor Line* cases (*supra*), it is no argument for the legality of foreign ships possessing and transporting intoxicating liquors in and across our waters, that they do not intend to use the liquors until after leaving the jurisdiction of the United States, for the Court said in that connection:

'The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country \* \* \*'

'It is obvious that those whose wishes and opinions were embodied in the Amendment meant to

stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay. When, therefore, the Amendment forbids not only importation into and exportation from the United States but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the Amendment itself. The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. (Title III, Secs. 20, 41, Stat. 322).'

"Are we, then, to argue that such inflexible provisions of law, declared by our Supreme Court as the constitutional policy of our country, shall apply to our own citizens but be abandoned when we deal with ships of a foreign nation? To do so would be a grievous surrender of our sovereignty. And it is outside the province of an executive or administrative officer of the Government to read into the law and the Constitution an exception not specifically contained therein. Particularly should it be provided when the results of granting the privilege to foreign ships would be to produce manifestly unfair conditions of competition for our own citizens and shipping interests. Chief Justice MARSHALL puts the situation clearly in '*The Exchange*,' 7 Cranch, 116, 136, 144:

'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. \* \* \*

'When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indis-



criminally with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation, if such individuals or merchants did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.'

"Again, in *The Eagle*, 8 Wallace, 15, 22, the Supreme Court hold that:

'All vessels entering into or departing from a domestic or foreign port, are bound to obey the laws and well-known usages of the port, and are subject to seizure and penalties for disobedience; and when submitting to them, they are entitled to all the protection which they afford.'

"The Court carefully considered this whole question in the *Walker* and *Anchor Line* cases, and went so far as to hold that the Eighteenth Amendment and the National Prohibition act repealed a prior existing treaty with Great Britain.

"Prior to the sweeping and comprehensive construction placed upon the prohibition law in those cases it might possibly have been arguable whether liquors forming a part of the ship stores on vessels within territorial waters might be regarded as an implied exception to the National Prohibition act. Whatever doubts that may have previously existed have been swept away by the

language of the majority opinion in those cases. It is true that this decision was rendered by a divided court, but the dissenting opinion clearly sets forth the arguments that must have been carefully weighed before majority opinion was rendered. It included a consideration of such arguments as:

"‘This country does not undertake to regulate the habits of people elsewhere’ and ‘it has no interest in meddling with them across its territory if leakage in transit is prevented.’ But the very vigor of the dissenting opinion in which three judges joined simply emphasize the sweeping character of the majority by which I feel I am bound in deciding this question.

"I am therefore of the opinion that the Eighteenth Amendment and the National Prohibition act prohibit as unlawful the possession and transportatoin of beverage liquors on board foreign vessels while in our territorial waters whether such liquors are sealed or open.

"By way of summary, therefore, I am of the opinion that under the rules of fair intendment American ships wherever they may be are included in the terms of the Eighteenth Amendment ‘territory subject to the jurisdiction’ of the United States, so that manufacture, transportation or sale of intoxicating liquors for beverage purposes is prohibited thereon. To construe otherwise would, in my opinion, violate the unmistakable intent in the adoption, such intent clearly adduced from the study of the circumstances out of which it grew and voiced by the Supreme Court in the *Walker* and *Anchor Line* cases.

"This interpretation is further supported by the many authorities that have held ships to be ‘constructive territory’ of the country whose flag they fly. Such decisions undoubtedly extend the protection as well as the inhibitions of the country’s laws.

"The National Prohibition act is an act of general jurisdiction in force wherever the Eighteenth Amendment

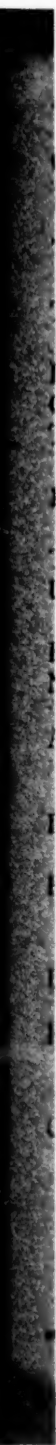
applies; and the courts of the United States have jurisdiction to punish its violations on the high seas.

"I am forced to the opinion under the ruling of the *Walker* and *Anchor Line* decisions (*supra*), that foreign ships carrying intoxicating beverage liquors as ship stores or otherwise, within the three-mile limit of our shores, are violating the provisions of the National Prohibition act prohibiting possession or transportation of intoxicating liquors for beverage purposes. The Supreme Court therein has held that it is not material that the liquors may not be intended for beverage uses within the United States, because the court emphasized that the Eighteenth Amendment marks a revolution in our former national policy toward intoxicating liquor and does not confine its prohibition in any meticulous way within the United States, but on the contrary its intent was as far as possible to 'stop the whole business.'

Respectfully,

H. M. DAUGHERTY,  
Attorney General.

HON. ANDREW W. MELLON, Secretary of the Treasury."



FILED  
JAN 2 1923

**In the Supreme Court of the United States**

October Term, 1922

No. 659, 660, 661, 662, 666, 667, 668, 669, 670, 678, 693, 694.  
THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR  
LINE (HENDERSON BROS.) LTD., Appts.,  
THE OCEAN STEAM NAVIGATION COMPANY, LTD.,  
Appts.,

INTERNATIONAL NAVIGATION COMPANY, LTD., Appts.,  
CAMPAGNIE GENERALE TRANSATLANTIQUE, Appts.,  
THE NETHERLANDS-AMERICAN STEAM NAVIGATION CO.,  
(HOLLAND-AMERICAN LINE), Appts.,

LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGA-  
TION COMPANY, LTD., Appts.,

THE ROYAL MAIL STEAM PACKET COMPANY, Appts.,  
UNITED STEAMSHIP COMPANY OF COPENHAGEN, (SCAN-  
DINAVIAN-AMERICAN LINE), Appts.,

PACIFIC STEAM NAVIGATION COMPANY, Appts.,  
NAVIGAZIONE GENERALE ITALIANA, Appts.,

vs.

ANDREW W. MELLON, Secretary of Treasury of the  
United States, et al.

INTERNATIONAL MERCANTILE MARINE COMPANY,  
Appts.,

vs.

H. C. STUART, Collector of Customs of the Port of New  
York and RALPH A. DAY, Federal Prohibition Direc-  
tor, et al.

UNITED AMERICAN LINES, Appts.,

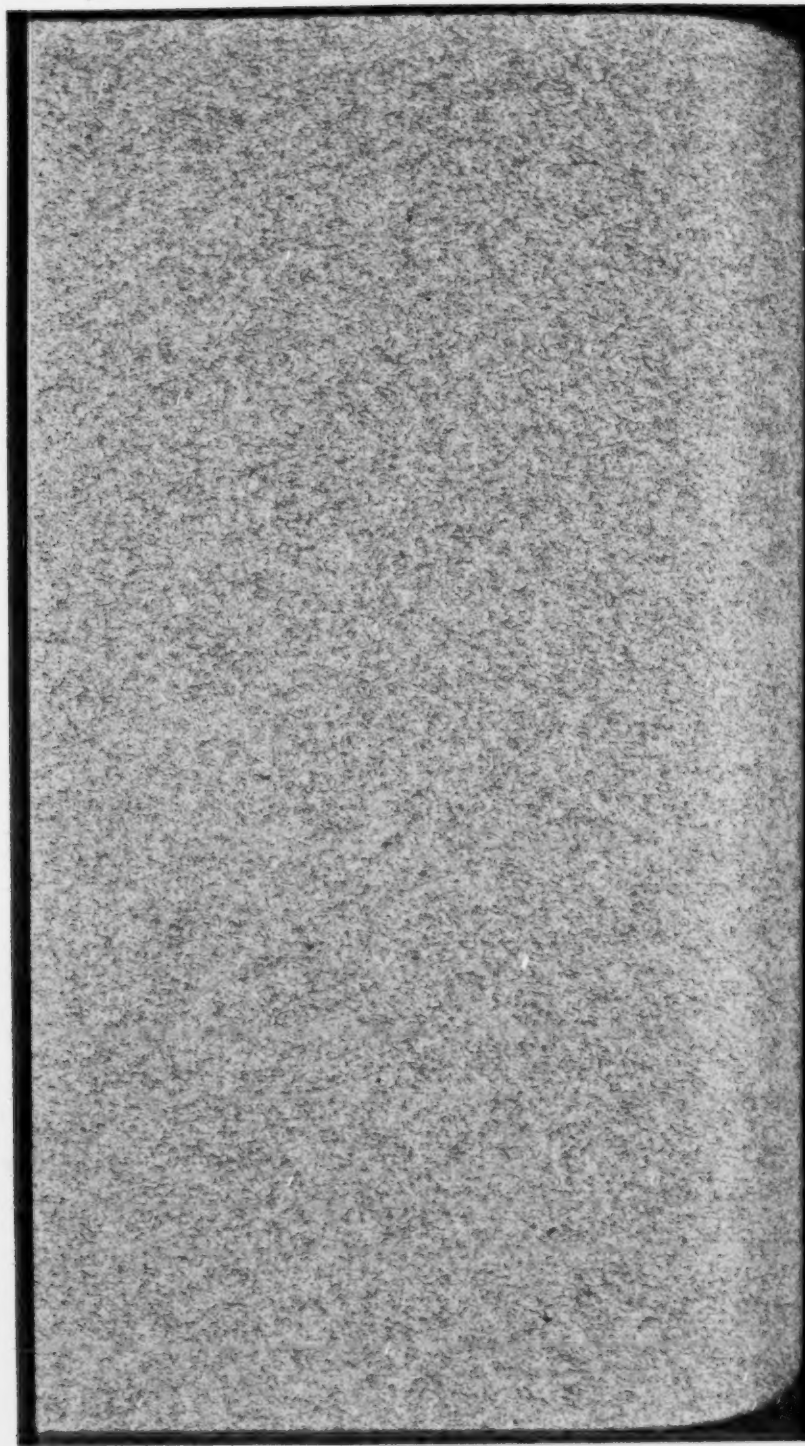
vs.

H. C. STUART, Collector of Customs of the Port of New  
York and JOHN D. APPLERY, Federal Prohibition Zone  
Chief, et al.

On Appeal from the United States District Court for the  
Southern District of New York

**BRIEF AMICI CURIAE**

ANDREW WILSON,  
WAYNE B. WHEELER,  
*Attorneys, Amici Curiae.*



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# In the Supreme Court of the United States.

October Term, 1922

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Appeals from the United States District Court for the  
Southern District of New York.

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**BRIEF AMICI CURIAE ON BEHALF OF  
DEFENDANT.**

Agreeable to the permission of the court this brief is  
filed in the hope that it will prove helpful in the solution  
of the questions of law involved.

**STATEMENT.**

This brief is submitted in support of the following prop-  
ositions of law which are determinative in these cases.

The transportation, possession or furnishing of intoxi-  
cating liquors for beverage purposes upon vessels of the  
United States at all places and upon foreign vessels within  
the territorial waters of the United States is unlawful  
under the Eighteenth Amendment to the Constitution of  
the United States and the National Prohibition Act.

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I. THE EIGHTEENTH AMENDMENT PRO-  
HIBITS ALL TRANSPORTATION OF INTOXI-  
CATING LIQUORS FOR BEVERAGE PURPOSES  
WITHIN THE UNITED STATES AND ALL TER-  
RITORY SUBJECT TO THE JURISDICTION  
THEREOF.

The Eighteenth Amendment insofar as it is applicable  
to this question provides :

"The \* \* \* transportation of intoxicating liquors within \* \* \* the United States, and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited. \* \* \*"

This prohibition flows from an amendment to the Constitution. The amendment not only lays the prohibition but defines the extent of its jurisdictional application. The language of the article is comprehensive and prohibits all transportation of intoxicating liquors within the United States and all territory subject to the jurisdiction thereof for beverage purposes. This amendment institutes a new policy upon the part of the national government and confers upon Congress a portion of the police power heretofore residing solely in the states.

In any attempt to apply the decisions of this court construing the territorial application of acts of Congress and to reason therefrom in their application to the Eighteenth Amendment, certain fundamental differences must be noticed. In the original Constitution of the United States there were two clauses which conferred upon Congress authority to legislate with reference to ships upon the high seas. They were: Article I, Section 8, Clause 10, which provides in defining the legislative power of Congress, "that Congress shall have power \* \* \* to define and punish piracies and felonies committed on the high seas and offenses against the law of nations"; and Article III, Section 2, which provides that "judicial power shall extend \* \* \* to all cases of admiralty and maritime jurisdiction \* \* \* "

Examining these two sections of the original Constitution it will be observed that they do not lay any prohibition or define any offense. The first specifically provides that Congress shall have power to punish piracies and felonies, the second merely defines the jurisdiction of the courts. Therefore, under these two sections of the

original Constitution until there was a plain legislative enactment upon the part of Congress indicating an intent to punish a specific offense upon the high seas the court had no jurisdiction to try and punish such offenders, and in all of the decisions by this court construing the acts of Congress enacted pursuant to these powers the question was always, has Congress exercised this power conferred?

When consideration is given to the Eighteenth Amendment a very fundamental and material difference is apparent. The Eighteenth Amendment represents a changed policy by the sovereign people through the addition of a new principle to the organic law. It in itself lays a prohibition and defines the extent of its application by declaring that its provision shall apply to the United States and all territory subject to the jurisdiction thereof. In this case there is no need to determine whether Congress has legislated to create an offense upon the high seas. The amendment itself does that and imposes upon Congress the duty of enacting appropriate legislation for its enforcement. In other words the offense is declared by the Constitution and in this instance the source of power is not alone that derived from the clauses of Article I or Article III, above quoted. The Eighteenth Amendment is co-ordinate and co-existent with the articles of the original Constitution. Because the Eighteenth Amendment is a part of the Constitution and in terms defines the extent of its operation the legislation enacted by Congress for its enforcement must be co-extensive with the amendment itself. The only similar principle in the Constitution to that embodied in the Eighteenth Amendment is that found in the Thirteenth Amendment prohibiting slavery, which also defines the extent of its operation. See the language of Justice Brown in *Downes vs. Bidwell*, 182 U. S. 45, 44 L. Ed. 1088, 1092.

and in comprehensive terms defined the scope within which the prohibition was to apply is indicative of an intention upon the part of the people of the United States that there should be nothing left to surmise or implication as to the extent of its operation.

This court in its decision in the case of *Rhode Island vs. Palmer*, 253 U. S. 350, 64 L. Ed. 946, in which it upheld the validity of the amendment and the constitutionality of the National Prohibition Act enacted for its enforcement, said:

"The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits."

It will be observed that the court uses the words "is operative throughout the *entire* territorial limits of the United States." These are not words of limitation. If the court had intended to use restrictive language in connection with the interpretation of the Amendment it would have used the phrase "actual territorial limits." The phrase "actual territorial limits" is one which is well understood in international law when the purpose is to refer to the actual confines of a country and the territorial waters over which jurisdiction is commonly exercised as a matter of sovereign right under international law.

The contention that the use of the words "territorial limits" is indicative of an intention to refer simply to lands is based upon a mis-apprehension. If it is attempted to limit the use of the words "territorial limits" simply to lands by the adoption of a literal construction, such as is contended for by those urging the narrow interpretation,

it would be possible to go still further and say that the Eighteenth Amendment has no application to the navigable waters of this country since they are not a part of the land. The phrase "entire territorial limits" employed by the court, is properly susceptible of no such interpretation. Mr. Chief Justice White, in his concurring opinion in speaking of the prohibition laid in the amendment, said :

"In the first place, it is indisputable, as I have stated, that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative and efficacious."

II. THE NATIONAL PROHIBITION ACT PROHIBITS ALL TRANSPORTATION, POSSESSION OR FURNISHING OF LIQUOR EXCEPT WHERE EXPRESS AUTHORIZATION THEREFOR IS FOUND IN THE ACT. THOSE WHO SEEK TO SET UP AN EXCEPTION MUST ESTABLISH IT AS BEING WITHIN THE WORDS AS WELL AS THE REASON THEREOF.

Section 3 of Title II of the National Prohibition Act provides :

"No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

This statute enacted by Congress for the enforcement of the Eighteenth Amendment is co-extensive with the operation of the amendment itself. Upon this point this court said in *Rhode Island vs. Palmer*; 253 U. S. 350, 64 L. Ed. 946:

"The power confided to Congress by the provisions of the Eighteenth Amendment to the Federal Constitution, that 'the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation,' while not exclusive, is *territorially co-extensive with the prohibition of that Amendment*, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them." (*Italics ours.*)

The National Prohibition Act not only prohibits the transportation and sale of intoxicating liquors for beverage purposes but also prohibits the possession and furnishing of such liquors for beverage purposes except where specific authorization is made therefor in the Act.

The general rule of statutory construction is that even an expressed proviso carves special exceptions only out of a general enacting clause; and that those who set up any such exception must establish it as being within the words as well as the reason therefor.

*United States vs. Dickson*, 15 Pet. 141, 165, 10 L. Ed. 689; *Ryan vs. Carter*, 93 U. S. 78, 83, 23 L. Ed. 807; *Schlemmer vs. Buffalo Railway*, 205 U. S. 1, 10, 27 Su. Ct., 407, 51 L. Ed. 681; *United States vs. Trinity Railway* (5th Circuit), 211 Fed. 448, 453, 128 C. C. A., 120.

In the instant case there is no express proviso authorizing the transportation, possession, or furnishing of beverage liquors on ships.

In all of the prohibition laws of the states which prohibit the manufacture, sale, transportation, etc., of intoxicating liquor except as authorized by the law, those who claim the right to make or possess such liquor must set forth the provisions in the law which authorized them to have control of the liquor. This is the form of the prohibition in Section 3 of the National Prohibition Act.



These laws do not confine the prohibition to the beverage liquor traffic, but prohibit intoxicating liquors for all purposes except as authorized in the Act. Those who desire to make, sell, transport or possess liquor under a general prohibition of such Acts must do so under some specific exception named in the law. In the recent case of *Crane vs. Campbell*, 245 U. S. 304, in construing the statute of the State of Idaho which prohibited the possession of whisky even for medicinal purposes, this court sustained the decision of the State Supreme Court that held:

"The only means provided by the Act for procuring intoxicating liquors in the prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicines, so that the possession of whisky, or of any intoxicating liquor, other than wine and pure alcohol for the uses above mentioned is prohibited."

Section 15 of the State law provides:

"It shall be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this Act provided."

The full text of the statute of Idaho setting forth the exceptions will be found in the decision of the State Supreme Court in *Ex Parte Crane*, 151 Pac. Rep. 1006.

In construing the National Prohibition Act the Circuit Court of Appeals, Sixth Circuit, in *Small Grain Distilling & Drug Company vs. Hamilton*, 276 Fed. 544, said:

"The prohibitory language of sections 3 and 6 is prima facie universal; those who seek to show a right within the exceptions stated must make that right clear."

That this is the rule adopted in the construction of prohibitory laws is well established. The Supreme Court of

Utah in construing an act of the Legislature of that State (Laws 1917, Ch. 2) *State vs. Certain Intoxicating Liquors*, 172 Pac. 1050, prohibiting all sale, manufacture, use and possession of intoxicating liquor except as authorized, in answer to the contention that the statute did not prohibit the possession of liquor acquired prior to the date upon which the act became effective and intended for the personal use of the owner, said:

"(1) No exceptions being made in the act other than the foregoing, we think it is made clear by the sections quoted that it was the legislative intent to not only forbid the possession but to abolish property rights in alcoholic liquors within the confines of the State after August 1, 1917, aside from the exceptions expressly provided for in the Act, no matter when or how acquired, for what use intended, or in what place kept or possessed. \* \* \*"

Other illustrations of this are found in the decisions of the Supreme Court of Washington, case of *State vs. Giaudrone*, 186, Pac. 870; the decision of the Supreme Court of Nebraska in the case of *Fitch vs. State*, 167 N. W. 418.

This principle was again sustained by this court in the recent case of *Grogan vs. Walker*, wherein it was said:

"The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. Title III, Section 21, 41 Stat. 322."

III. THE RIGHT OF CONGRESS TO PROHIBIT THE POSSESSION OF INTOXICATING LIQUORS IS WELL ESTABLISHED. IT IS APPROPRIATE LEGISLATION FOR THE ENFORCEMENT OF THE EIGHTEENTH AMENDMENT.

The Circuit Court of Appeals for the Ninth Circuit in the case of *Page vs. United States*, 278 Fed. 41, held:

"The restrictions on the possession of intoxicating liquors contained in National Prohibition Act, Title II, Section 3, are reasonably adapted to the enforcement of the prohibition against the unlawful manufacture, sale, or transportation of intoxicating liquors under the Eighteenth Amendment, so that such restrictions are not beyond the power of Congress to enact."

A writ of certiorari was denied by this court in this case. 258 U. S. ———, 42 Su. Ct. 461, 66 L. Ed. ———.

The Circuit Court of Appeals, for the Eighth Circuit in the case of *Massey vs. United States*, 281 Fed. 293, held:

"Under Const. Amend. 18, prohibiting the manufacture, sale, and transportation, but not the possession, of intoxicating liquor, section 2 of which gives Congress power to enforce the amendment by appropriate legislation the provisions of the National Prohibition Act making the possession of intoxicating liquor unlawful was reasonably proper to enforce the prohibition against the manufacture and sale of such liquor, so as to be within the power of Congress, even though the statute may embrace some instances in which possession is not the result of unlawful manufacture, sale, or transportation."

This court in passing upon the alleged Constitutional right to possession of liquor for beverage purposes held in the case of *Crane vs. Campbell*, 245 U. S. 304, 62 L. Ed. 304:

"The mere possession of whisky for personal use may be rendered criminal by state legislation without abridging privileges or immunities of citizens of the United States, or depriving a person of life, liberty, or property without due process of law."

The Supreme Court of Alabama in the case of *Phelps vs. State*, 75 So. 877, held:

"It is a violation of the prohibition law for defendant to retain in his possession liquors that were owned and possessed by him before the law became operative."

See also *State vs. Certain Intoxicating Liquors*, (Utah) 172 Pac. 1050; *Jones vs. State*, (Ala.) 85 So. 839; *State vs. Giaudrone*, (Wash.) 186 Pac. 870; *Lacount vs. State*, (Ga.) 104 S. E. 920; *People vs. Stambosva* (Mich.) 178 N. W. 226; *State vs. Macek*, (Kan.) 180 Pac. 985; *Bank vs. State*, (Texas) 230 S. W. 994; *People vs. Sandy*, (Colo.) 203 Pac. 671.

In the instant case there is no express proviso in the National Prohibition Act itself, there is no provision in any treaty nor is there other statutory authority authorizing transportation, possession or the furnishing of beverage liquors on vessels of the United States anywhere or upon foreign vessels within the territorial waters of the United States. Such an exception can arise only by implication. The position of the shippers in the *Grogan* case was much stronger. In that case they relied upon the express provisions of a treaty and the terms of Section 3005 of the Revised Statutes of the United States. In the instant case the exception can arise only by implication. Implied exceptions are not favored and can arise only where to adopt a literal construction would defeat the purpose of the legislation. This necessitates a consideration of the purpose of the Eighteenth Amendment and National Prohibition Act.

#### IV. THE PURPOSE OF THE EIGHTEENTH AMENDMENT IS CONCLUSIVE OF ITS CORRECT CONSTRUCTION.

The Supreme Court said in the case of *Maxwell vs. Dow*, 176 U. S. 580, 44 L. Ed. 597, of the rule of construction to be applied to constitutional amendments:

"The language of a constitutional amendment should be read in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then construed, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted."

The ultimate purpose of all prohibition statutes is to prevent the consumption of intoxicating liquors for beverage purposes. The Supreme Court of Alabama in the case of *Southern Express Company vs. Whittle*, 194 Ala. 406, 69 So. 652, said:

"The object and purpose of all laws governing the subject of intoxicating liquors is 'to promote temperance.' The evil to be remedied is the use of intoxicating liquors as a beverage."

See: *Ex Parte Crane*, 151 Pac. 1006; *Lincoln vs. State*, 27 Vt. 320 at 337; *State vs. J. P. Bass Publishing Co.*, 104 Me. 288, 71 A. 894; *State vs. Certain Intoxicating Liquors (Utah)* 172 Pac. 1050; *State vs. Giaudrone (Wash.)* 186 Pac. 870; *Fitch vs. State, (Neb.)* 167 N. W. 417, 419; *West Virginia vs Adams Express Co.*, (C. C. A., 4th Cir. Ct.), 219 Fed. 794; *Trageser vs. Gray*, 73 Md. 250, 20 Atl. 905; *Crane vs. Campbell*, 245 U. S. 304, 62 L. Ed. 304.

The courts not only consider the purpose of the statute but the nature of the evil to be remedied as well, as was said by Mr. Justice McReynolds in sustaining the prohibition statutes of Idaho in the case of *Crane vs. Campbell*, 245 U. S. 304, 62 L. Ed. 304:

"It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a state has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guaranties of the Fourteenth Amendment.

\* \* \*

It was said by the Court of Errors and Appeals of New Jersey in the case of *Paul vs. Gloucester*, 50 N. L. Law 585, 15 Atl. 272, 1 L. R. A., 86:

"The sale of intoxicating liquors has, from the earliest history of our state, been dealt with by legislation in an exceptional way. It is a subject by itself, to the treatment of which all the analogies of the law, appropriate to other topics, cannot be applied."

The Eighteenth Amendment represents the culmination of a half century struggle upon the part of the people of the United States in an attempt to reach a satisfactory solution of the problems arising from the use of intoxicating liquor as a beverage. The various steps of the progress of this movement are strikingly portrayed in the decisions of the United States Supreme Court from the decision in the case of *Leisy vs. Hardin*, 135 U. S. 100, 34 L. Ed. 128, wherein the court held that intoxicating liquors shipped into a state were protected under the commerce clause as long as they remained in the original package. This was met by the passage of what was known as the Wilson Law, which was sustained in *In Re Rahrer*, 140 U. S. 545. This in turn was followed by the passage of the Webb-Kenyon Act, removing the interstate commerce protection from intoxicating liquors introduced into a state in violation of the law of a state, sustained in the case of *Clark Distilling Company vs. Western Maryland Railway Company*, 242 U. S. 311.

So widespread had become the demand for legislation prohibiting the manufacture and sale of intoxicating liquors at the outbreak of the World War, that Congress, in the exercise of the power conferred by the Constitution to wage war, prohibited the manufacture and sale of intoxicating liquors as a war measure. This legislation was sustained in *Hamilton vs. Kentucky Distilleries and Warehouse Company*, 251 U. S. 146, and *Ruppert vs.*

Caffey, 251 U. S. 264. The application of the principle of prohibition on a national scale met with such general approval that Congress on December 18, 1917, submitted a resolution proposing the Eighteenth Amendment to the Constitution of the United States. This resolution required that it be ratified within seven years, if it was to become operative. The proposed amendment was so responsive to popular demand that by January 16, 1919, the Legislatures of the necessary three-fourths of the states had ratified it, and up to the present time the Legislatures of forty-six of the forty-eight states have ratified the amendment. This amendment was ratified ~~within a shorter period of time~~ <sup>in less than</sup> than any amendment to the Constitution which had preceded it. To a peculiar degree it represents the popular demand of the people of the United States.

That it was the purpose of the people in incorporating this amendment in the Constitution to withdraw all sanction and protection of this government from beverage intoxicants without regard to whether they were to be used or consumed by citizens of this country is evidenced by the comprehensive language employed in the Amendment itself, for the amendment prohibits the *exportation of intoxicating liquors for beverage purposes*, although such liquors are not intended for use by the citizens of the United States. As this court in speaking of this feature of the Amendment aptly expressed it in the case of *Grogan vs. Walker*:

"\* \* \* It does not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. \* \* \*"

Congress, in the exercise of the duty imposed upon it to enact appropriate legislation for its enforcement, has also framed legislation broad in its terms to give effect to the true intendment of the Amendment. Section 3 of the

Act lays down a broad prohibition by providing that "no person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in the Act, and all of the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquors as a beverage may be prevented."

In the remaining sections of the Act exceptions are made for the procuring and use of intoxicating liquors for non-beverage purposes. There are no exceptions created in the statute with reference to vessels of the United States anywhere or as to foreign vessels within the territorial waters of the United States. *Where Congress in its legislative wisdom deemed an exception proper it made express provision for it.* A single instance of this is found in the case of transportation of liquor through the Panama Canal or on the Panama Railroad. But even in this excepted case the liquor is required to be in transit and it is expressly provided that there shall be no sale of such liquors for beverage purposes within the Canal Zone. These provisions of the statute clearly show that Congress recognized the nature of the evil to be remedied and withdrew the protection of this government, insofar as it was within its sovereign power, from all possession or transportation of intoxicating liquors coming within the jurisdiction of this country, irrespective of whether it was to be consumed by citizens of this country. This but followed the purpose of the Amendment in prohibiting exportation and this has been the construction given the Amendment and statute by this court in the case of *Grogan vs. Walker*, wherein the shipping interests contended that the transshipment of liquors through this country was not within the purview of the Amendment. The court said:



"They did not want intoxicating liquor in the United States, and reasonably may have thought that if they let it in some of it was likely to stay."

Considering next the practical questions involved. According to enforcement officers one of the chief difficulties at present in law enforcement is the smuggling of liquors into the United States in the guise of ship stores or through other forms of subterfuge. The practical considerations involved in the construction of the statute apply as reasons for prohibiting the transportation, possession or furnishing of liquors upon foreign vessels within the territorial limits in the instant case, with even greater force than they did in the case of *Grogan vs. Walker*, and *Anchor Line vs. Aldridge*. In that case the question of the permission to transship liquors through this country involved to the people of the United States simply the danger that some of the liquor might be diverted in transit. There is involved in the instant case, the additional element of unjust discrimination against vessels of the United States if an exception be implied in the statute. (See Exhibit "A," p. 45.)

The Attorney General of the United States in an opinion rendered October 6, 1922, in reaffirming a ruling made by the former Attorney General, of November 1, 1920, held that the transportation or possession of intoxicating liquor upon vessels of the United States whether within or without the territorial waters of the United States was prohibited under the Eighteenth Amendment and National Prohibition Act. This view has also been sustained by the courts in the case of *United States vs. 254 Bottles of Intoxicating Liquor*; 281 Fed. 247 wherein the District Court for the Southern District of Texas held:

"Possession of intoxicating liquors on the high seas by captain of a vessel owned and operated for the account of the United States Shipping Board Emergency Fleet Corporation was illegal, and they were subject to forfeiture under the National

Prohibition Act, Title II, sections 3, 6, 26; the ship being a part of the territory of the United States."

District Judge Learned Hand in passing upon these cases when they were before him, said in speaking of the purpose of the Eighteenth Amendment and National Prohibition Act:

"\* \* \* Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thoroughgoing in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the amendment, and its very want of particularity, is a good index that it meant to cover what it could. \* \* \* Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded."

In the case of the application of the Eighteenth Amendment and National Prohibition Act to vessels of the United States on the high seas it is true that the National Prohibition Act does not in express terms extend its application to vessels upon the high seas, but these rulings are based upon the fact that this offense is created by the Constitution itself which not only lays the prohibition but defines the extent of its operation. There being no exception made with reference to vessels of the United States upon the high seas it naturally follows that the prohibition applies to them. In the instant cases there are no exceptions made in the statute authorizing the transportation, possession or furnishing intoxicating liquor by foreign vessels within the territorial waters of the United States. If the people of the United States did not intend that vessels of the United States should have the privilege of transporting or possessing intoxicating liquors it is unlikely that they would have discriminated

in favor of foreign nations as against vessels of the United States. The National Prohibition Act provides that it shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. As between a construction which will prevent vessels transporting or possessing liquor for beverage purposes from entering the jurisdiction of the United States and one which will permit such entry there can be no doubt as to which construction better tends to prevent the use of beverage intoxicants. The courts in endeavoring to ascertain the intention of the legislative body will not only consider the language of the statute but the practical results flowing from such interpretation. The mere suggestion that the people of the United States intended to grant to foreign nations a privilege which they denied to their own citizens, carries its own refutation.

In considering the practical effect of a construction of the Act of Congress relating to American Seamen the Supreme Court of the United States in the case of *Patterson vs. Eudora*, 190 U. S. 168, 47 L. Ed. 1002 held the provisions of the statute to be equally applicable to foreign ships and said of the reasons which induced Congress to enact it:

"Moreover, as ninety per cent of all commerce in our ports is conducted in foreign vessels, it must be obvious that their exemption from these shipping laws will go far to embarrass domestic vessels in obtaining their quota of seamen. To the average sailor it is a consideration while in port to have his wages in part prepaid, and if, in a large port like New York, ninety per cent of the vessels are permitted to prepay such seamen as ship upon them, and the other ten per cent being American vessels, cannot thus prepay, it will be exceedingly difficult for American vessels to obtain crews. This practical consideration, presumably, appealed to Congress and fully justified the provision herein contained."

The indisputable purpose of the people of the United States in adopting the Eighteenth Amendment and of Congress in passing the National Prohibition Act was to make its prohibition of uniform application within the limits of its jurisdiction; to discriminate against none and to treat all nations alike.

V. THE LANGUAGE OF THE STATUTE AS WELL AS THE DECISIONS OF THIS COURT INDICATE THAT IT IS TO BE GIVEN A LIBERAL RATHER THAN A RESTRICTED CONSTRUCTION TO EFFECT ITS PURPOSE.

Section 3, Title II of the National Prohibition Act provides:

"All the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquors as a beverage may be prevented. \* \* \*

The uniform decisions of this court in construing the National Prohibition Act are to the effect that it is to be given a liberal rather than a restricted construction. This is evidenced by the decision in the case of *Rhode Island vs. Palmer*, 253 U. S. 350, 64 L. Ed. 946, wherein the provision defining intoxicating liquors to include beverages containing as much as one-half of one per cent of alcohol was sustained, although such might not be in fact intoxicating; see also *Ruppert vs. Caffey*, 251 U. S. 264, 64 L. Ed. 261, also sustaining the prohibition as applicable to liquors manufactured prior to the date the Act became effective and denying compensation to the owners thereof. *Rhode Island vs. Palmer* and *Ruppert vs. Caffey*, *supra*. Sustaining the application of the prohibition to liquors purchased prior to the date the act became effective and stored in bonded warehouses though intended solely for use of the owner in the home. *Corneli vs. Moore*, 66 L. Ed. —. Denying the contention of the British shippers that under the provisions of a treaty

they were entitled to transship liquors through this country in bond. *Grogan vs. Walker, Anchor Line vs. Aldridge.*

**VI. VESSELS OF THE UNITED STATES ARE TERRITORY OF THE UNITED STATES. THE PROHIBITIONS OF THE EIGHTEENTH AMENDMENT APPLY TO THEM WHEREVER THEY ARE.**

Vessels on the high seas occupy a position in law unlike that of any other species of property. This is shown by the following excerpts from Moore's International Law Digest, Volume 1, Page 930, wherein it is said:

"It is often stated that a ship on the high seas constitutes a part of the territory of the nation whose flag it flies. In the physical sense, this phrase obviously is metaphorical. In the legal sense, it means that a ship on the high seas is subject to the exclusive jurisdiction of the nation to which, or to whose citizens, it belongs. The jurisdiction is quasi territorial."

For the purpose of the administration of law such merchant vessels are constructively considered a part of the territory of the nation to which they belong, both as regards the application of civil and criminal statutes. This is the view expressed by this court in the case of *St. Clair vs. United States*, 154 U. S. 134, 38 L. Ed. 936. This was a prosecution for murder under Section 5339 of the Revised Statutes of the United States providing for the punishment of "every person who commits murder upon the high seas \* \* \* within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state." The court held:

"A vessel registered as a vessel of the United States is, in many respects, considered as a portion of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs."

In the case of *United States vs. Rodgers*, 150 U. S. 249, 37 L. Ed. 1071, which was an indictment for murder committed on the Great Lakes, this court held that the term "high seas" included the unenclosed waters of the Great Lakes, and said:

"A vessel is deemed a part of the territory of the country to which she belongs."

See also the case of *Wynne vs. United States*, 217 U. S. 240, 54 L. Ed. 748, wherein this court sustained a conviction for murder committed on board an American ship lying in the harbor at Honolulu. It was held there was nothing in the Hawaiian Organic Act of April 30, 1900, which expressly or impliedly deprived Federal courts of their jurisdiction to punish murder under the circumstances, when committed in a haven or arm of the sea within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular state.

See also the case of *Wiborg vs. United States*, 163 U. S. 633, 41 L. Ed. 289, which was an indictment for embarking upon a military expedition prohibited by the United States Revised Statutes, Section 5286. The indictment was sustained where the evidence showed that the parties in pursuance of an agreement were taken by a tug thirty or forty miles out to sea to a steamer on which they embarked, whereon they drilled in preparation for participation in the Revolution in Cuba. The majority of the court sustained the conviction notwithstanding the dissenting opinion of Mr. Justice Harlan in which he held that the defendant could not have been said to have done any act within the territorial jurisdiction of the United States within the contemplation of the statute. It will be observed that the overt acts in this case were committed on the high seas.

See also the case of *Miller vs. United States*, 242 Fed. 907, sustained by this court in 62 L. Ed. 535. The case

of a conviction for the unlawful theft of fish on the high seas.

See the case of *Daeche vs. United States*, 250 Fed. 566, the Circuit Court of Appeals for the Second Circuit held:

"In a prosecution under Cr. Code, Section 37 (Comp. St. 1916, Section 10201), denouncing conspiracies to commit any offense against the United States, and Section 298 (Comp. St. 1916, Section 10471), denouncing the offense of attacking any vessel belonging to another with intent to unlawfully plunder the same or despoil any owner thereof of any goods, etc., where defendants to aid Germany conspired to attach to munition bearing ships while in the waters of the United States infernal machines which would explode while they were *on the high seas*, the offense must be deemed to have been committed within the United States, which was the place where the last conscious act of the wrongdoers was performed." (*Italics ours.*)

See also *Pedersen, et al., vs. United States*, 271 Fed. 187.

Mr. Justice Field, in *United States vs. Smiley*, 6 Sawyer 640, 645, stated the rule of law determining the territory subject to the criminal jurisdiction of the United States as follows:

"Their actual territory is co-extensive with their possessions, including a marine league from their shores into the sea. \* \* \* The constructive territory of the United States embraces vessels sailing under their flag; wherever they go they carry the laws of their country, and for a violation of them their officers and men may be subject to punishment."

Our diplomatic correspondence and the opinions of the courts have uniformly considered that insofar as the restraining and protecting jurisdiction of our government is concerned, American ships whether owned by the government or by private citizens or corporations are in many respects territory of the United States, both for

purposes of civil and criminal jurisdiction; the *Scotia*, 14 Wall. 170, 184; *Crapo vs. Kelly*, 16 Wall. 610; *Lindstrom vs. International Navigation Company*, 117 Fed. 170; Mr. Blaine, Secretary of State, to Mr. Ryan, Minister to Mexico, Nov. 27, 1889, (*Moore's Int. Law Digest*, vol. I, page 931; Mr. Webster, Secretary of State, to Lord Ashburton, August, 1842 cited in *Rogers vs. United States*, 150 U. S. 247; *St. Clair vs. United States*, 154 U. S. 134, 152; *United States vs. Smiley*, 6 Sawy. 640, 645; *Wilson vs. McNamee*, 102 U. S. 572; *Manchester vs. Mass.*, 139 U. S. 240; For purposes of taxation, *People vs. Com. of Taxation*, 58 N. Y. 2421; *Olsen vs. San Francisco*, 82, Pac. 850; *Pilotage Laws*; *Wilson vs. McNamee*, 102 U. S. 572; *Laws concerning assignment*, *Crapo vs. Kelly*, 16 Wall. 610; *Manchester vs. Mass.*, 139 U. S. 240; *Old Dominion Steamship Company vs. Gilmore*, 206 U. S. 402, 403; For purpose of extradition; *Moore on Extradition*, vol. I, page 135, section 104; *Vogt* 14 Op. Att. Gen., 281; *Wharton's State Trials*, pages 392, 403, 404; *Seale's Cases on Conflict of Laws*, Section 22, page 506.

VII. MERCHANT VESSELS OF ONE SOVEREIGN ENTERING THE PORTS OF ANOTHER SUBJECT THEMSELVES TO THE LAW OF THE PORT OF ENTRY. REQUIRING FOREIGN VESSELS ENTERING OUR PORTS SEEKING OUR TRADE TO COMPLY WITH OUR LAWS VIOLATES NO RULE OF INTERNATIONAL LAW.

The people of the United States and Congress are possessed of full authority to enact this legislation. It is based upon the fundamental right of a sovereign to enforce its laws. Every sovereign nation has the inherent right to admit or refuse entrance to vessels belonging to another nation as it may see fit, and may impose such conditions upon their entrance as in its legislative wisdom may be necessary.



The construction of the statute, herein contended for, involves no unjust discrimination in violation of treaty rights. It treats all nations alike. It affords to natives of foreign nations the same protection as to natives of this country. This is all that they may demand under any law, international, municipal or moral. The construction operates uniformly upon the citizens of all nations. Authorities for this principle are as follows:

**EACH FULLY SOVEREIGN STATE HAS EXCLUSIVE JURISDICTION OVER ITS OWN TERRITORY AND WITHIN THAT TERRITORY THE STATE IS ABSOLUTE.** 22 Cyc. International Law, page 1718. Chief Justice Marshall in the early case of *The Schooner Exchange vs. McFadden, et al.*, 7 Cranch, 114; 3 L. Ed. page 287, laid down the law upon the subject as follows:

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

**MERCHANT VESSELS OF ONE SOVEREIGN ENTERING THE PORTS OF ANOTHER SUBJECT THEMSELVES TO THE LAWS OF THE PORT OF ENTRY.** This principle was also laid down by Chief Justice Marshall in the case of *The Schooner Exchange vs. McFadden et al.*, 7 Cranch, 144, 3 L. Ed. 296, as follows:

"When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the

inhabitants of that other, or when merchant vessels enter for the purpose of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption."

This enunciation by Chief Justice Marshall has been repeatedly followed by this court and has become a well established principle of our jurisprudence. In the case of *Patterson vs. Eudora*, 190 U. S. 168, 47 L. Ed. 1007, in speaking of the Act relating to American Seamen, the court said:

"\* \* \* *Yet when a foreign merchant vessel comes into our ports, like a foreign citizen coming into our territory, it subjects itself to the jurisdiction of this country.*" (Italics ours.)

In the case of *United States vs. Diekelman*, 92 U. S. 520, 23 L. Ed. 742, this court said:

"Merchant vessels of one country, visiting the ports of another, for the purpose of trade, subject themselves to the laws which govern the ports so visited, so long as they remain; and this as well in war as in peace, unless otherwise provided by treaty."

See also *Mali vs. Keeper of Common Jail*, 120 U. S. 1, 30 L. Ed. 565. This view is also sustained by text

writers on International Law and by diplomatic Correspondence of nations. Moore's International Law Digest, Volume 2, Section 204, page 272, 273.

THERE ARE INNUMERABLE INSTANCES OF THE EXERCISE OF THIS INHERENT POWER OF A SOVEREIGN TO PROHIBIT BOTH UNDESIRABLE PERSONS AND PROPERTY FROM ENTERING WITHIN ITS TERRITORIAL LIMITS AND SUSTAINING THE AUTHORITY TO PROVIDE THE CONDITIONS UPON WHICH SUCH ENTRANCE MAY BE MADE. Illustrations of this principle, as it applies to persons, will be found in the Chinese Exclusion Act in the case of *Nishimura Ekiu vs. United States*, 142 U. S. 659, 35 L. Ed. 1146 in which this court said:

"It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, lib. 2 sections 94, 100; 1 Phillimore (3rd ed.) chap. 10, section 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war; and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers

vested by the Constitution in the government of the United States or in any department or officer thereof. U. S. Const. art. 1, section 8; Head Money Cases, 112 U. S. 580 (28:798); Chae Chan Ping *vs.* United States, 130 U. S. 581, 604-609 (32: 1068, 1075, 1076)."

EXCLUSION AND DEPORTATION OF ANARCHISTS. *United States vs. Williams*, 194 U. S. 278, 48 L. Ed. 979; PROHIBITING THE IMPORTATION OF SPONGES. *Abby Dodge vs. United States*, 223 U. S. 172, 56 L. Ed. 390; PROHIBITING THE IMPORTATION OF TEA. *Buttfield vs. Stranahan*, 192 U. S. 468, 48 L. Ed. 525; OPIUM—PUNISHMENT FOR THE RECEIPT, CONCEALMENT OR TRANSPORTATION OF OPIUM IMPORTED IN VIOLATION OF THE ACT OF CONGRESS. In the case of *Brolan vs. United States*, 236 U. S. 216, 59 L. Ed. 544, this Court sustained the Act of Congress of February 9, 1909, 35 Statutes at Large, 614, Chap. 100. Mr. Chief Justice White said:

"It is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation, it has also in other than tariff legislation, exerted a police power over foreign commerce by provisions which, in and of themselves, amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines, and chemicals entitled to admission into the United States, and excluding such as did not equal the standards adopted. 9 Statutes at L. 237, Chapter 70, Rev. Stat. section 2933, Comp. Stat. 1913, section 5622. And see *Oceanic Steam. Nav. Co. vs. Stranahan*, 214 U. S. 320, 334,

335, 53 L. Ed. 1013, 1020, 29 Sup. Ct. Rep. 671; The Abby Dodge, 223 U. S. 166, 176, 56 L. Ed. 390, 393, 32 Sup. Ct. Rep. 310."

If Congress in the exercise of its power under the Constitution to regulate commerce with foreign nations was authorized to prohibit the importation of such innocuous commodities as tea and sponges there can be no question of its authority in the exercise of its powers to prohibit the importation or transportation of intoxicating liquors, under the Eighteenth Amendment.

**GREAT BRITAIN**—The British Parliament has repeatedly exercised this right. See the Act prohibiting the importation of foreign prison made goods. Act of 1897, 60, 61 Vict., Chapter 63, Section 2. Also other illustrations will be found in Section 42 of the Consolidated Customs Act of 1876 as amended, 39, 40 Vict. Chapter 36, Section 42.

**LEGISLATIVE CONDITIONS FOR ENTRANCE INTO PORTS MAY BE MADE TO APPLY EQUALLY TO BOTH DOMESTIC AND FOREIGN SHIPS AND IN CERTAIN INSTANCES NATIONS HAVE IMPOSED CONDITIONS PRECEDENT AS A PRE-REQUISITE TO ENTRANCE INTO ITS PORTS THOUGH THE ACT REQUIRED TO BE PERFORMED OR OMITTED IS TO BE DONE BEYOND ITS TERRITORIAL LIMITS.** In the case of *Abby Dodge v. United States*, 223 U. S. 172, 56 L. Ed. 390, this court passed upon the Act of June 20, 1906, 34 Stat. at Large, 313, making it unlawful to land, deliver, cure or offer for sale at any port or place in the United States, any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida. The exact language of the first section of this act is as follows:

"That from and after May first, Anno Domini nineteen hundred and seven, it shall be unlawful

to land, deliver, cure, or offer for sale at any port or place in the United States, any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida; Provided, That sponges taken or gathered by such process between October first and May first of each year in a greater depth of water than fifty feet shall not be subject to the provisions of this act: And, provided further, That no sponges taken from said waters shall be landed, delivered, cured, or offered for sale at any port or place in the United States of a smaller size than four inches in diameter."

It was contended that this act was invalid for two reasons, first, that it attempted to regulate sponges taken within territory which might be within the jurisdiction of the states and was therefore beyond the authority of Congress to enact; and second, that if it be construed to apply only to sponges taken beyond the jurisdiction of the state it would then deal with sponges taken in the open sea and beyond the jurisdiction of the national government. The court sustained the first proposition, namely, that Congress had no power to legislate with reference to sponges taken within the jurisdiction of the state but held that in view of the well known distinction between the powers of the Federal and State governments it would not be so construed but would be held to apply to sponges taken in mid-ocean, and pointed out that its penalties were equally applicable to foreign as well as American ships. The court said:

"Undoubtedly (Lord & Goodall, N. & P. S. Co., 102 U. S. 541, 26 L. Ed. 224), whether the Abby Dodge was a vessel of the United States or of a foreign nation, even *although it be conceded that she was solely engaged in taking or gathering sponges in the waters which, by law of nations, would be regarded as the common property of all, and was transporting the sponges so gathered to the United*

States, the vessel was engaged in foreign commerce, and was therefore amenable to the regulating power of Congress over that subject. This being not open to discussion, the want of merit of the contention is shown, since the practices from the beginning, sanctioned by the decisions of this court, establish that Congress, by an exertion of its power to regulate foreign commerce, *has the authority to forbid merchandise carried in such commerce from entering the United States.*" (Italics ours.)

The court dismissed the libel in the case because it failed to negative the fact that the sponges may have been taken from waters within the territorial limits of the state, but the court was careful to point out the right of Congress to legislate with reference to sponges taken in the open sea when attempted to be brought into the United States, for the court said:

"In view of the paramount authority of Congress over foreign commerce, *through abundance of precaution we say that nothing in this opinion implies a want of power in Congress*, when exerting its absolute authority to prohibit the bringing of merchandise, the subject of such commerce into the United States, to cast upon one seeking to bring in the merchandise, the burden, if an exemption from the operation of the statute is claimed, of establishing a right to the exemption." (Italics ours.)

ACT OF UNITED STATES CONGRESS KNOWN AS THE HARTER ACT. By Section 1 of the Act of Congress of February 13, 1893, 27 Stat. at L. 445, it was declared to be unlawful for the representative or owner of any vessel transporting merchandise from or between ports of the United States and foreign ports to insert in any bill of lading any clause for relief from liability for damages arising from negligence from the proper loading, storage, custody, care or delivery of property so transported. In 1900 this court in the case of Knott Botany Worsted Mills

179 U. S. 68, 45 L. Ed. 90 held that this Act of Congress overrode and nullified any stipulation concerning limited liability on a contract for carriage. The facts in this case were: A British vessel, the "Portuguese Prince," belonging to a line trading between New York, Brazil and the West Indies, undertook the transportation of certain bales of wool from Buenos Aires. The bill of lading exempted the carrier from liability for certain forms of negligence. This court said:

"The remaining question is whether the first section of the Harter Act applies to a foreign vessel on a voyage from a foreign port to a port in the United States. *The power of Congress to include such cases in this enactment cannot be denied in a court of the United States.* The point in the controversy is whether, upon the proper construction of the act, Congress has done so. That the third section does extend to such a vessel on such a voyage has been already decided by this court." (Italics ours.)

The *Sylvia*, 171 U. S. 462, 43 L. Ed. 241, 243; The *Chattahoochi*, 173 U. S. 540, 43 L. Ed. 801, 806.

LIMITED LIABILITY ACT OF 1851. The Act of Congress of March 3, 1851, 9 Statutes at Large, 635, reproduced in sections 4282 and 4289 of Revised Statutes provided for limited liability upon the owners of vessels for losses arising from certain causes. In the case of the *National Steam Navigation Company vs. Dyer*, 15 Otto 24, 26 L. Ed. 1001, this court said:

"The Limited Liability Act of 1851 reproduced in the Revised Statutes in section 4282, etc., applies to owners of foreign as well as domestic vessels; and to acts done on the high seas as well as in the waters of the United States, except when a collision occurs between two vessels of the same foreign nation, or perhaps of two foreign nations having the same maritime law."



THE PLIMSOLL ACT OF GREAT BRITAIN. See Volume 2, Moore's International Law Digest, 282.

It is a well recognized principle of both criminal and international law that penal laws of a sovereign have no extra territorial jurisdiction, but in many instances, however, nations have provided conditions precedent for the entrance of vessels into their ports and imposed penalties for violation thereof, though the condition to be performed or omitted was to take place beyond the territorial limits of such nation.

GREAT BRITAIN. In the case of *The Annapolis vs. Johanna Stoll*, (1861) Lush. 295, the High Court of Admiralty held:

"The British legislature has no authority over foreign vessels on the high seas out of British jurisdiction, *but may impose any conditions on foreign vessels entering a British port*, and consequently an obligation on foreign ships inward bound to take a pilot at an convenient station *beyond the three mile limit is valid.*"

UNITED STATES. This was the precise question presented in the case of *Abby Dodge vs. United States*, 223 U. S. 172, 56 L. Ed. 390, wherein this court sustained the act of Congress making it unlawful to land, deliver, cure or offer for sale at any port or place in the United States any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida, although it applied to acts done beyond the territorial waters of the United States and to foreign vessels as well as vessels of the United States.

The Eighteenth Amendment and National Prohibition Act do not apply to the conduct of foreign vessels outside of the territorial waters of the United States. The foregoing cases are merely cited as illustrations of the plenary power possessed and exercised by nations in the execution of domestic policies.

THERE IS NO VESTED RIGHT IN ANY INDIVIDUAL TO TRADE WITH FOREIGN NATIONS WHICH PRECLUDES CONGRESS IN THE EXERCISE OF ITS PLENARY POWER TO REGULATE FOREIGN COMMERCE TO EXCLUDE COMMODITIES FROM ENTRY INTO THIS COUNTRY. This was fully established by this court in the case of *Buttfield vs. Stranahan*, 192 U. S. 468, 48 L. Ed. 525. In this case the court sustained the validity of the Tea Inspection Act of March 2, 1897, 29 Statutes at Large, 604, which forbade the importation of teas of a quality inferior to the government standard. This act authorized the destruction of any tea which was not removed within six months after their inspection by the inspector of teas. VIII. THE DECISION OF THIS COURT IN THE CASES OF *GROGAN vs. WALKER AND ANCHOR LINE vs. ALDRIDGE* IS CONCLUSIVE OF THESE CASES.

Every argument which has been urged in these cases was passed upon by this court in those cases, and fully considered, as is evidenced by the opinion of the court.

In one of those cases certain foreign vessels claimed the right to remove liquors from one foreign vessel in New York harbor to another, for shipment to a foreign port under customs bond, and claimed exemption from the operation of the statute by virtue of Section 3005 of the Revised Statutes and a treaty. The liquor was not to remain in this country. It was to be under customs bond while in transit in this country. It was claimed that it was neither importation nor exportation from this country. It was like the liquor which formerly was sealed and locked as a part of the ship's stores when it came into the harbors of the United States.

After considering fully the former status of the law and Section 3005 of the Revised Statutes, which formerly per-

mitted such shipments, and Article 29 of the treaty concluded with Great Britain the court said:

"In view of the parallelism between the statute and the treaty the question seems of no importance except so far as the existence of the treaty might be supposed to intensify the reasons for construing later legislation as not overruling it. But make-weights of that sort are not enough to affect the result here.

"On the other side is the Eighteenth Amendment forbidding 'the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof for beverage purposes.' There is also the National Prohibition Act of October 28, 1919, ch. 85, Title II, Section 3, 41 Stat. 305, 308, which provides that except as therein authorized, after the Eighteenth Amendment goes into effect no person shall manufacture, sell, barter, *transport*, import, export, deliver, furnish or *possess* any intoxicating liquor. All the provisions of the act are to be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. (*Italics ours.*)

"The routine arguments are pressed that this country does not undertake to regulate the habits of people elsewhere and that the references to beverage purposes and use as a beverage show that it was not attempting to do so; that it has no interest in meddling with the transportation across its territory if leakage in transit is prevented, as it has been; that the repeal of statutes and *a fortiori* of treaties by implication is not to be favored; and that even if the letter of a law seems to have that effect a thing may be within the letter yet not within the law when it has been construed. WE APPRECIATE ALL THIS, BUT ARE OF OPINION THAT THE LETTER IS TOO STRONG IN THIS CASE. (*Capitals ours.*)

"The Eighteenth Amendment meant a great revolution in the policy of this country, and pre-

sumably and obviously meant to upset a good many things on as well as off the statute books. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True, this discouraged production here, but that was forbidden already, and the provision applied to liquors already lawfully made. See *Hamilton vs. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 126, 151, n. 1. It is obvious that those whose wishes and opinions were embodied in the Amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay. When, therefore, the Amendment forbids not only importation into and exportation from the United States, but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the Amendment itself. The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. Title III, Section 20; 41 Stat. 322."

It follows clearly, therefore, from this decision that the possession, transportation or furnishing of beverage intoxicants are prohibited within the territorial limits of the United States because of the provision in Section 3 and there is no exemption or exception to it. This conclusion is made more definite and certain when we read the dissenting opinion of Mr. Justice McKenna.

IX. THE CONSTRUCTION SOUGHT BY THE FOREIGN SHIPPING INTERESTS IN THIS CASE SEEKS TO IMPOSE A LIMITATION UPON THE

SOVEREIGNTY OF THE UNITED STATES BY IMPLICATION. LIMITATIONS UPON SOVEREIGNTY ARE NOT FAVORED BY THE COURTS AND ARISE ONLY WHERE THE LANGUAGE OF THE LEGISLATIVE BODY IS EXPLICIT.

In the consideration of these cases the character of the complainants and the nature of the privilege sought must not be overlooked. The complainants are foreign shipping interests seeking a special privilege in the matter of trade with the United States. The construction which is sought seeks to impose a limitation upon the sovereignty of the United States. They rely simply upon custom and existing practice. The right of the United States to determine upon what conditions foreign vessels seeking our trade can enter our ports cannot be gainsaid. There is no principle of international law involved. Even before the Eighteenth Amendment was adopted Congress possessed the power under the authority conferred by the Constitution to regulate commerce with foreign nations and to prohibit vessels of foreign nations entering the ports of the United States whenever it saw fit. This right was exercised repeatedly without the infringement of any principle of international law.

In the light of these facts the slight basis upon which the privilege now being sought is based, becomes manifest. In Moore's International Law Digest, Volume II, Page 18, he discusses the rule of construction in such cases:

"If, therefore, a dispute occurs between a territorial sovereign and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it the burden lies of proving its claim beyond doubt or question."

It is insisted by the foreign steamship companies that an implied exception must be made in the statute

insofar as liquors commonly designated as sea stores, intended entirely for the subsistence of the passengers and crew, are concerned. It is contended that as to this class of beverage liquors that they occupy a position somewhat like that of the furniture or other appurtenances of the ship, and are necessary for its operation; that the customs laws of the United States expressly recognize these sea stores and that the transportation of such sea stores aboard foreign vessels while within the territorial waters of the United States is not a transportation within the meaning of that term as employed in the Eighteenth Amendment and National Prohibition Act.

A sovereign nation may prohibit the entry of foreign vessels within its ports entirely, if such a step should be considered necessary in the administration of its governmental policy. Nations may, and do, legislate concerning the character of the equipment or the furnishings of vessels entering their ports. There are many illustrations of this found in statutes regulating the equipment necessary for the safeguarding of human life; statutes regulating the manner of loading of vessels and sanitary laws enacted for the protection of the public health.

The sections of the Revised Statutes of the United States dealing with sea stores, R. S. 2795, 2796, 2797, 3111, 3112 and 3113, indicate merely that these statutes were enacted for the effective collection of the customs duties imposed by the statutes of the United States. Section 2795 in this connection reads: "In order to ascertain what articles ought to be exempt from duty, as the sea stores of a vessel, the Master shall particularly specify the articles."

District Judge Learned Hand, in speaking of this question, said:

"Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful since in form it

only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the *policy*, and not the *promise of the nation*. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard." (Italics ours.)

Judge Hand then pointed out the reasons given by this court in its decision in the case of *Grogan vs. Walker and Anchor Line vs. Aldridge*. He said:

"In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan vs. Walker*, *supra*, the provision against export may have been intended to prevent the use of stimulants outside the United States, and, so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the law runs for all.

"Naturally I have nothing to say about the wisdom of the amendment or the law, but wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that any who would hesitate to think so who did not already repudiate the whole

reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion.

"Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a Judge cannot take any position on that question; it must be enough for him that each is forbidden."

Judge Hand then pointed out that although in the argument of the cases before him no distinction was made between such portions of the sea stores as were intended for the consumption of passengers and that intended as rations for the crew, he points out the distinction, but states that both are equally within the purpose of the amendment and the statute. He says:

"It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decision I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unliklihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded.



To say that the section covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be expected, but these are not because they are ship's stores.

"Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crews' rations stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later."

The position of the foreign steamship companies in the case of *Grogan vs. Walker and Anchor Line vs. Aldridge* was immeasurably stronger than their position in the instant cases. In those cases they relied upon the provision of an existing treaty and the language of Section 3005 of the Revised Statutes of the United States permitting transshipment of merchandise through this country. In those cases this court held that notwithstanding treaty provisions and the language of the statute, the privilege sought by the foreign shippers could not be implied in the face of the altered national policy of this government, manifested in the Eighteenth Amendment to the Constitution. This court said:

"In view of the parallelism between the statute and the treaty the question seems of no importance except so far as the existence of the treaty might be supposed to intensify the reasons for construing later legislation as not overruling it. But make-weights of that sort are not enough to affect the result here."

In the present cases, sole reliance is placed upon the existing custom. There is no distinction made in the customs statutes of the United States between such portions of sea stores as are intended for consumption by passengers and that portion intended as rations for the crew. Such a distinction is wholly unjustifiable. In the face of the sweeping language of the Amendment and the statute, a right predicated merely upon custom and usage cannot prevail in the face of the changed policy expressed in the fundamental law of the United States.

The cases decided by this court, cited by counsel for the foreign ship owners, such as *Gloucester Ferry Company vs. Pa.*, 114 U. S. 196; *Rhodes vs. Iowa*, 170 U. S. 412; *Louisville & Nashville Railroad vs. Cook Brewing Company*, 223 U. S. 70; *Danciger vs. Cooley*, 248 U. S. 31, to the effect that the transportation of such liquor as sea stores within the territorial waters of the United States is not a transportation within the meaning of the Amendment and statute are not controlling in this case. Those cases all involved the question of the validity of state legislation effecting interstate commerce. They are based upon the peculiar relation existing in this country, under our form of government, between the states and the federal government. Legislation by the states, insofar as it effects interstate commerce, is, under the Constitution, subordinate to the superior authority of Congress in the exercise of its power under the commerce clause. The Eighteenth Amendment is an exercise of sovereign power by the people of the United States and is subject to no superior authority. Furthermore, under this statute it is not only the transportation which is prohibited, but also the possession or furnishing of such liquors within territory subject to the United States which is unlawful.

## CONCLUSION

In conclusion the following may be said concerning both of the legal questions involved in this controversy. The construction contended for by the shipping interests, both as to vessels of the United States on the high seas and vessels of foreign nations within the territorial waters of the United States, involves an implied exemption. This would have to be made in the face of the literal language of the amendment and the statute as well as contrary to their spirit, and is predicated entirely upon the argument of convenience of trade and the existing customs.

It is contended by counsel for the shippers that the question of comity of nations is seriously involved in the issue under discussion and that to construe the Federal Prohibition legislation as prohibiting all transportation within the territorial limits of the country would involve the United States in serious trade controversies. It is submitted that there is a far more serious question involved than mere matters of comity and trade. It is the question of whether there shall be enforced in the United States the laws of the United States or whether there is to be substituted for the will of the nation that of foreign powers. In view of the source of this legislation which is the will of the people expressed in an amendment to the Constitution, it would be contrary to American traditions, inconsistent with all precedents of treaty, constitutional and statutory interpretation to *read into the law by implication an exception not expressly contained therein and one tending to defeat its purpose*, merely upon the grounds of inconvenience of trade.

The shipping interests have urged as one of the reasons for seeking this exemption, the fact that the laws of certain foreign nations require that the immigrants and members of their crew be furnished wines and that it is impossible to compete in trade unless vessels of the United States have the same privileges. If foreign nations, in pursuance of their domestic policies can require vessels

entering their ports, seeking their trade, to comply with their domestic laws, certainly the United States is no less sovereign than any one of these nations. Shall the express will of the people of the United States embodied in an amendment to their fundamental law be declared subordinate to the will of any other people? That is the issue in this controversy. The construction which is sought involves a confession of weakness and a limitation upon the sovereign right of the people of the United States inconsistent with all of her past traditions; and incompatible with their honesty of purpose; whereas the construction which is urged herein asserts the right of a sovereign people to enforce their fundamental law and imposes upon foreign nations no duty of observance inconsistent with any principle of international law. It will treat all nations alike. This is but an elementary principle of simple justice. By this, vessels of the United States on the high seas, which claim the protection of the stars and stripes are but required to observe the Constitution of the United States, from which the flag derives its significance and power, and foreign nations made to observe a governmental policy flowing not simply from a legislative enactment but from the source of all power—the will of the people.

For these reasons, as well as the fact that Congress has consistently refused to enact legislation to permit the sale of intoxicating liquors on vessels of the United States upon the high seas although insistently besought to do so (see H. R. 11579 of the 66th Congress and hearing on the same, Serial 26, January 13, 1921, before the House Judiciary Committee of the 67th Congress), it is respectfully submitted that the decision of the District Court for the Southern District of New York in these cases should be affirmed.

Respectfully submitted,

ANDREW WILSON,  
WAYNE B. WHEELER,  
*Attorneys, Amici Curiae.*

**EXHIBIT (A)****UNITED STATES LINES**

45 Broadway

New York

Moore & McCormack Co., Inc.	} Managing Operators
Roosevelt Steamship Co., Inc.	

*December 9, 1922.*

A. D. Lasker, Esq., Chairman,  
United States Shipping Board,  
Washington, D. C.

Dear Mr. Lasker:

The Freight and Passenger Agents with whom we do business are giving us the "merry laugh" this morning.

Whenever we have dinners or luncheons on board our steamers for Passenger and Freight Agents (and we must have them throughout the year, because the other lines do the same thing, and it is necessary for us to keep them as our friends), we serve a fine buffet luncheon or a good dinner, with soft drinks, cigars, etc., but no cocktails, wines, or beer.

These Agents attended a buffet luncheon on board the S. S. FORT VICTORIA yesterday noon, at Pier 95 North River, at which they were freely served cocktails, wines and beer. As a matter of fact the luncheon itself did not amount to anything, and most of those present practically construed the invitation as one to "come up and have a drink"—of which they all availed.

If we are to be up against this kind of competition, because of the failure of the Treasury and Prohibition Officers to enforce prohibition on foreign steamers as it is enforced on American steamers, it can have only one result, and the foreign lines will be carrying all of the freight

and passenger traffic of the United States, because the agents will be working for them instead of for American lines.

Very truly yours,

T. H. ROSSBOTTOM,  
*General Manager.*

THR/G







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# In the Supreme Court of the United States.

OCTOBER TERM, 1922.

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|---|---|----------|
| THE CUNARD STEAMSHIP COMPANY, LTD.,<br>and Anchor Line (Henderson Brothers),<br>Ltd., appellants, | } | No. 659. |
| <i>v.</i><br>ANDREW W. MELLON ET AL.  |   |          |
| OCEANIC STEAM NAVIGATION COMPANY,<br>Ltd., appellants,  | } | No. 660. |
| <i>v.</i><br>ANDREW W. MELLON ET AL.  |   |          |
| INTERNATIONAL NAVIGATION COMPANY,<br>Ltd., appellants,  | } | No. 661. |
| <i>v.</i><br>ANDREW W. MELLON ET AL.  |   |          |
| COMPAGNIE GENERALE TRANSATLAN-<br>tique, appellants,  | } | No. 662. |
| <i>v.</i><br>ANDREW W. MELLON ET AL.  |   |          |
| THE NETHERLANDS AMERICAN STEAM<br>Navigation Company (Holland Ameri-<br>can Line), appellants,    | } | No. 666. |
| <i>v.</i><br>ANDREW W. MELLON ET AL.  |   |          |
| LIVERPOOL, BRAZIL AND RIVER PLATE<br>Steam Navigation Company, Ltd., ap-<br>pellants,             | } | No. 667. |
| <i>v.</i><br>ANDREW W. MELLON ET AL.  |   |          |
| THE ROYAL MAIL STEAM PACKET COM-<br>pany, appellants,   | } | No. 668. |
| <i>v.</i><br>ANDREW W. MELLON ET AL.  |   |          |

UNITED STEAMSHIP COMPANY OF COPEN-  
hagen (Scandinavian American Line),  
appellants, } No. 669.

v.  
ANDREW W. MELLON ET AL.

THE PACIFIC STEAM NAVIGATION COM-  
pany, appellants, } No. 670.

v.  
ANDREW W. MELLON ET AL.

NAVIGAZIONE GENERALE ITALIANA, AP-  
pellants, } No. 678.

v.  
ANDREW W. MELLON ET AL.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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**BRIEF ON BEHALF OF THE APPELLEES.**

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**STATEMENT.**

These are appeals by ten foreign steamship companies from final decrees of the District Court of the United States for the Southern District of New York, dismissing bills of complaint filed to enjoin the defendants from enforcing against their ships plying between American and foreign ports the provisions of the National Prohibition Act, as construed by the Attorney General of the United States, and embodied in regulations pursuant thereto made by the Secretary of the Treasury. The cases were heard upon bill and answer on motions made by the plaintiffs for final decrees granting the relief prayed for, and, by the defendants, to dismiss the bills. The motions to

dismiss the bills were granted and decrees accordingly entered.

Each of the plaintiffs is a foreign corporation owning and operating lines of steamships carrying passengers between European and American ports. The defendants are officers of the United States charged with the duty of enforcing the law in question.

The question presented is the application of the Eighteenth Amendment and the National Prohibition Act to intoxicating liquor brought into ports of the United States by foreign ships as part of their sea stores.

The plaintiffs in Nos. 659, 660, 661, 667, 668, and 670 are British corporations operating ships of British registry.

The plaintiff in No. 662 is a French corporation operating ships of French registry.

The plaintiff in No. 666 is a Dutch corporation operating ships of Dutch registry.

The plaintiff in No. 669 is a Danish corporation operating ships of Danish registry.

The plaintiff in No. 678 is an Italian corporation operating ships of Italian registry.

The allegations of the bills are fully set forth in the appellant's brief and need not be repeated.

#### **GROUND'S FOR AN INJUNCTION.**

Briefly we may state the facts alleged as grounds upon which the bills ask equitable interference of the court as follows:

(1) It has always been the practice of vessels to carry wines, liquors, and other intoxicating bever-

ages as part of their sea stores for the consumption of the passengers and crew; many of the passengers and of the crews are accustomed to use wines and liquors. If the passengers can not obtain it they will travel by other routes, and if the crews can not have it there will be difficulty in obtaining crews.

(2) A considerable number of the crews of vessels plying between American and Italian ports are Italians, and they carry many third-class passengers for which it is necessary to have Italian stewards. The Italian law requires certain officers and members of the crew of ships carrying third-class passengers to be Italians and compels the ship to furnish one-half liter of wine per day for each third-class passenger and a larger quantity to the crew. In the case of Italian ships, the entire crew must be Italian subjects. The French ships are subject to similar provisions of French law differing in detail, not in principle.

(3) If the National Prohibition Act is enforced so that these ships can not carry wines and liquors, it will result in large financial loss to the owners, and they will suffer much embarrassment from the conflict of laws and the difficulty in obtaining crews.

All the bills contain general allegations to the effect that the defendants intend to enforce the law in such manner as to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States. The bills allege the lack of an adequate remedy except in a court of equity

and ask that the defendant be enjoined from enforcing the law in the manner threatened.

#### THE ANSWERS.

The answer in each case sets forth six objections to the bill as follows:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued;

2. The court has no jurisdiction to grant the relief prayed for;

3. The bill does not present a cause of action in equity under the Constitution of the United States;

4. The bill does not disclose a cause of action equitable in its nature, civil in its character, and arising under the Constitution of the United States;

5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity;

6. The complainant has a complete remedy at law.

The answer further alleges that any difficulty which the complainants may experience in obtaining adequate crews from among the nationals of countries in which the custom to use alcoholic liquors is widespread would be readily obviated by the payment of higher wages, and that many of the vessels of the American merchant marine carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages, and that such vessels have never had difficulty in obtaining adequate crews. The answer denies the allegations that the

ruling of the Attorney General and the regulations are and will be void or contrary to the complainants' rights under existing treaties, and denies also the other conclusions alleged in the bill with respect to the unconstitutionality of the interpretation of the prohibition act by the Attorney General. The answer also alleges that if the claim of the plaintiffs is correct it would imply the right of any ship to carry liquors within the territorial waters of the United States; that a large and profitable business has been carried on, resulting in the importation of liquor into this country contrary to the law by vessels with foreign registry; that the former rulings of the Secretary of the Treasury have actually been used as a cloak for smuggling, and that the success of the complainants' contentions will result in a great increase of such operations; that complainants make large profits from the sale of intoxicating liquors on the high seas, and that the loss of such profit is the only definitely ascertainable loss which complainants will suffer; that the sale of intoxicating liquors on American ships has ceased, and that if vessels of foreign registry are facilitated in the sale of liquor on the high seas the resulting damage to the American merchant marine will be great and the result will be, in effect, a differential treatment giving preference to foreign ships over American ships.

#### THE ISSUE.

The amendment is aimed at the use of liquor for "beverage purposes." The meaning of these words is well understood, but it may be well to note that



the noun *beverage* is defined in the *Standard Dictionary* as: "Drink; that which is drunk; especially a pleasant or refreshing drink, or a habitual one." The vicious thing, therefore, is drinking intoxicants for pleasure, refreshment, or from habit. The definition could not have been phrased more exactly to fit the facts alleged in the bills. The claim is that the officers of the United States intend to prevent the ships from furnishing liquor to passengers and crew who habitually drink it for pleasure and refreshment, and the court is asked to construe the amendment and the enforcement act so as to permit them to bring and have liquor for that purpose within our ports and littoral waters freely and without molestation.

#### ARGUMENT.

##### I.

The eighteenth amendment and the national prohibition act require the application of prohibition to every place where the United States may exercise its jurisdiction.

The first section of the Eighteenth Amendment is as follows:

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The things prohibited are—

- (1) Manufacture,
- (2) Sale,
- (3) Transportation,
- (4) Importation into, and
- (5) Exportation from.

The subject of the prohibition is intoxicating liquors for beverage purposes.

The place of the prohibition is "the United States and all territory subject to the jurisdiction thereof."

By section 2 Congress is given power to enforce the article by appropriate legislation.

Congress, therefore, has express power in its discretion to enact all laws which it may deem desirable or necessary to accomplish the purpose of section 1 of the amendment.

#### **The enforcement statutes.**

Congress has passed two acts to enforce the amendment, the National Prohibition Act (41 Stats. Part 1, p. 305) and an act supplemental thereto (act of November 23, 1921, c. 134).

The National Prohibition Act is entitled—

An act to prohibit intoxicating beverages and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries.

Section 3 of Title II of that act provides:

No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: \* \* \*

While the act makes provision for the use of intoxicants for medicinal and sacramental purposes, it nowhere contains any provision whereby their use for beverage purposes is made lawful in any place except a private dwelling for the personal consumption of the owner, his family and his bona fide guests. (Sec. 33, Title II.)

By section 17 it is made unlawful to advertise anywhere, or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the same, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises.

By section 18 of Title II it is unlawful to advertise, manufacture, sell, or possess for sale any utensil,

contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor, and by section 19 no person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of the act.

By section 21 it is provided:

Any room, house, building, *boat, vehicle, structure, or place* where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, *boat, vehicle, structure, or place* is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, *boat, vehicle, structure, or place* shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction. (Italics ours.)

By section 25 it is unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, "*and no property rights shall exist in any such liquor or property.*" This section provides for the issuance of search warrants and contains a proviso that no search warrants shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of liquor, or unless it is in part used for some business purpose, and the term "private dwelling" is to be construed to include the "room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house."

Section 33 of the act provides as follows:

After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used

by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.

The act may be searched in vain for any provision which allows anyone to have liquor for beverage purposes anywhere except in his dwelling. There is nowhere the suggestion that vessels in our waters enjoy any immunity.

Even the use of liquor as medicine by the sick is drastically restricted.

Under section 7 of Title II not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days, and no prescription shall be filled more than once, and no one but a physician holding a permit to prescribe liquor shall make any such prescription.

By act of November 23, 1921, c. 134, entitled "An act supplemental to the national prohibition act," it was provided in section 3:

That this act and the national prohibition act shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; \* \* \*

Section 2 provides that only spirituous and vinous liquor may be prescribed for medicinal purposes, and that no physician shall prescribe any vinous liquor containing more than 24 per cent alcohol by volume, or on any prescription, more than one-fourth of a gallon of vinous liquor, or any vinous or spirituous liquor containing separately or in the aggregate more than one-half pint of alcohol for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, unless on application it shall be clearly apparent to the commissioner that, for some extraordinary reason, a larger amount is necessary. Under the same section, no spirituous liquor shall be imported into the United States, nor shall any permit be granted authorizing the manufacture of any spirituous liquor save alcohol, until the amount of such liquor now in distilleries or other bonded warehouses shall have been reduced to a quantity that, in the opinion of the commissioner will, with liquor that may thereafter be manufactured and imported, be sufficient to supply the current need thereafter for all nonbeverage uses, and no vinous liquor shall be imported into the United States unless it is made to appear to the commissioner that vinous liquor for such nonbeverage use, produced in the United States, is not sufficient to meet such nonbeverage needs. The use of alcoholic liquors for medicinal purposes is thus more drastically restricted, and, whatever may have been true before, since the passage of the act of 1921 the

national prohibition act now applies not only to the United States *but to all territory subject to its jurisdiction*. Its application is, therefore, coextensive with the amendment itself, and if the amendment applied wherever the jurisdiction of the United States extends, the enforcement act has now the same application.

**The purpose of the amendment.**

The purpose or intent of the States in adopting the Eighteenth Amendment and that of the legislative body in initiating it, must be considered in the light of "the mischief to be prevented" (*Craig v. Missouri*, 4 Pet. 410, 431), the subject, the context and the intention of the body inserting the word in the Constitution (*McCulloch v. Maryland*, 4 Wheat. 316), "all the aids and lights of contemporary history" (*Kendall v. United States ex rel Stokes*, 12 Pet., 524), "in connection with the known condition of affairs out of which the occasion for its adopting may have arisen \* \* \* in a way, so far as is reasonably possible to forward the known purpose or object for which the amendment was adopted" (*Maxwell v. Dow*, 176 U. S. 581).

The history of the movement which led to the adoption of the 18th Amendment is a matter of common knowledge, and, whether one agrees with the principle or not, we all recognize the fact that it represents the culmination of a nation-wide movement which had been going on in the United States for many years prosecuted with a zeal which amounted in some cases to the spirit of religious fervor, opposed with a



bitterness equally zealous by those who denounced it as subversive of personal rights and liberties, but aimed at the total eradication of the use of alcoholic liquors of every kind and under all circumstances, except for strictly limited medicinal and sacramental purposes. It was essentially a moral crusade under religious leadership, frankly intended to save the people from a habit believed to be the chief cause of crime, poverty, and misery. It took no account of property rights and allowed no room for differences of opinion. Believing as they did, that the use of liquor did more than any other one thing to debauch and degrade our manhood and womanhood, the advocates of prohibition contended that whatever material hardship might be the direct or indirect result of prohibition, it should count as nothing in view of the evils to be removed and the blessings to follow.

It must be remembered that at the time the amendment was adopted over thirty of the forty-eight States already had absolutely prohibited the liquor traffic, and that all of them had in some measure restrained it. It was well established, as a matter of law, that each State had plenary power to prohibit the traffic and the use, and the Federal Government had, within the limits imposed by the Constitution, lent its aid to the States in their efforts to bring about absolute prohibition. Nevertheless, its advocates were not satisfied and, naturally, for the traffic which they sought to destroy still flourished.

Believing that the final destruction of the use of liquor for beverage purposes was necessary to the peace and good order of the country and of the world, they felt that that result could only be accomplished by an amendment which would bring to its destruction the full power of the Nation.

Finally it was ratified by forty-five of the forty-eight States. Undoubtedly, when the Amendment thus became an accomplished fact, those who had striven mightily for the result believed that never again, anywhere where the power of the United States could be exerted by law, would the drinking of liquor be lawful. Prohibition was now a fact, throughout the "United States and all territory subject to the jurisdiction thereof." They must have experienced an exaltation of spirit similar to that which moved Mr. Justice Miller in the *Slaughterhouse cases* to say of the war between the states, followed by the 13th Amendment (16 Wall. 36, 68):

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict.  
\* \* \* Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

After quoting the amendment, he continues:

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this Government—a

declaration designed to establish the freedom of four million slaves—and with microscopic search endeavor to find in it a reference to servitudes, which have been attached to property in certain localities, requires an effort, to say the least of it.

Anyone reading the language of the Eighteenth Amendment in the light of the history of the times must read indeed “with microscopic search” to find in the purpose of the amendment anything less complete than the commitment of the United States as a nation unalterably to the policy of suppressing with all its power the drinking of liquor for pleasure, refreshment, or from habit in every place to which its jurisdiction extended. Throughout the jurisdiction of the United States drinking as a “legalized social custom” was to perish under the iron heel of the law.

This court has recognized the force of this contention in *Grogan v. Walker*, and *Anchor Line v. Aldridge*, decided May 15, 1922. In those cases the court held that the transportation of intoxicants from a foreign port through some part of the United States to another foreign port, and the transshipment of intoxicants from a vessel in a port of the United States to another vessel bound for a foreign port, was a violation of the National Prohibition Act. In those cases Mr. Justice Holmes, speaking for the court, said of the act:

All the provisions of this act are to be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

The routine arguments are pressed that this country does not undertake to regulate the habits of people elsewhere, and that the references to beverage purposes and use as a beverage show that it was not attempting to do so; that it has no interest in meddling with transportation across its territory if leakage in transit is prevented, as it has been; that the repeal of statutes and *a fortiori* of treaties by implication is not to be favored; and that even if the letter of a law seems to have that effect a thing may be within the letter yet not within the law when it has been construed. We appreciate all this, but are of opinion that the letter is too strong in this case.

The eighteenth amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute books. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True, this discouraged production here, but that was forbidden already, and the provision applied to liquors already lawfully made. See *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 151, n. 1. It is obvious that those whose wishes and opinions were embodied in the amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay.

The vigor of the dissent in that case but lends emphasis to the position taken by the court. The object of the amendment and the national prohibition act was to stop the whole business.

*And this applies throughout the United States and all territory subject to the jurisdiction thereof.*

It is our contention that the matters decided by this court in the *Grogan* and *Anchor Line* cases not only compelled the Attorney General, in compliance with his oath of office, to give to the Secretary of the Treasury the advice which is at the basis of these actions, but that they require an affirmance of the decrees herein rendered. Judge Hand so regarded them, and his interpretation of their effect seems to us unanswerable. His opinion is printed in the transcripts of the records. (See record in No. 670, pp. 19 *et seq.*) He says (p. 21):

*Grogan v. Walker, supra, and Anchor Line v. Aldridge, supra,* plainly meant to adopt a broad canon for the interpretation of the national prohibition act, following the admonition at the end of the first paragraph of section three. Effecting a revolutionary reform in the habits of the Nation, the statute is to be understood as thoroughgoing in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the amendment, and its very want of particularity is a good index that it meant to cover what it could.

For this reason it is distinguished from earlier local acts of the same kind, as, for example, the Alaskan prohibition act, upon the language of section twenty-nine of which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I can not read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Continuing, he reasons that there is more ground for supposing that the admonition at the end of the first paragraph of section 3 of the National Prohibition Act covers these ship's stores than did the transportation before this court in the *Grogan* and *Anchor Line* cases. It was necessary to overrule at least as much, if not more, to reach the result in those decisions, especially because there were in them much stronger reasons to imply an exception from the literal language of the act. In those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of the treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws govern the right to enter ship's stores into the United States, a position very doubtful, since in form it only exempted them from customs duties, it must be conceded that the statute, old as it is, represented only the policy and not the promise of the Nation. He reasons that the custom in mari-

time affairs of long standing to treat ship's stores as part of the ship is not as weighty as the implication against the repeal of a treaty as in the *Grogan* and *Anchor Line* cases. Under the facts of those cases there was no conceivable danger in the transit of liquor, except the chance of its escape, that some of the liquor might not complete its passage. In the cases at bar the danger of an escape is equally present, and in the case of corporations less responsible than the appellants the danger might be great indeed. He then continues:

The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of the stocks are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the amendment to prevent drinking liquors.

Naturally, I have nothing to say about the wisdom of the amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would

hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol.

This court said in the *National Prohibition cases*, 253 U. S. 350, 386, that the first section of the amendment is operative throughout the entire territorial limits of the United States and binds all legislative bodies, courts, and public officers. With such an obligation binding the Attorney General, and with the decision of this court in the *Grogan* and *Anchor Line cases* before him, how could he, mindful of his oath of office, advise the Secretary of the Treasury that he had the power to prepare and promulgate rules and regulations permitting ships to bring to our ports liquor for beverage purposes and openly prepare, within the jurisdiction of the United States, for the gratification by its citizens of exactly those appetites which it was the avowed intent of the



Constitution to deny? Were aliens, temporarily enjoying the hospitality of our ports, in a privileged position and given rights and privileges on boats moored to our docks, denied to our own people on land?

## II.

**A foreign ship within the territorial waters of the United States is subject to their jurisdiction.**

In the first place, it is to be noted that the 18th Amendment is not the only source of the jurisdiction of the United States over foreign ships in our waters. It has always possessed that jurisdiction and has frequently, in common with all nations, exercised it. In the second point in appellants' brief, pages 25 *et sequitur*, many authorities are collected and quoted with respect to the jurisdiction of one nation over ships within its waters belonging to another nation, and also with respect to the jurisdiction of a nation over its own ships wherever they may be. With these authorities we have no dispute. Thus in *United States v. Diekelman*, 92 U. S. 520, 525, Mr. Chief Justice Waite says:

The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit so long as they remain. (See also *Moore's International Law Digest*, Vol. II, 275 *et seq.*)

In 1885 Mr. Bayard, Secretary of State, wrote to the French minister as follows:

A foreign merchant vessel going into the port of a foreign State subjects herself to the

laws of that State and is bound to conform to its commercial as well as to its police and other regulations during the period of her stay there. "She is as much a *subditus temporaneus*," remarks Sir R. Phillimore with reference to such a case, in *The Queen v. Keyn*, 2 Ex. D. 82, "as the individual who visits the interior of the country for the purposes of pleasure or business." (*Moore's International Law Digest*, Vol. II, p. 308.)

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange*, 7 Cranch. 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation if such \* \* \* merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." *United States v. Dieckelman*, 92 U. S. 520; 1 *Phillimore's Int. Law*, 3d ed. 483, sec. 351; *Twiss Law of Nations in Time of Peace*, 229, sec. 159; *Creasy's Int. Law*, 167, sec. 176; *Halleck's Int. Law*, 1st ed. 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. *Regina v. Cunningham*, Bell C. C.

72; S. C. 8 Cox C. C. 104; *Regina v. Anderson*, 11 Cox C. C. 198, 204; S. C. L. R. 1 C. C. 161, 165; *Regina v. Keyn*, 13 Cox C. C. 403, 486, 525; S. C. 2 Ex. Div. 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled. *Wildenhue's case*, 120 U. S. 11, 12.

Oppenheim, in his *International Law*, Vol. I, 3d ed. 339, 340, says:

Many writers maintain, and the practice of France and some other States support their view, that the littoral State has no jurisdiction in case only the internal order of the ship is affected, or the relations between members of the crew or passengers are alone concerned. However, there is no rule of international law which limits jurisdiction to this extent, and it can therefore claim jurisdiction in all matters over such merchantmen and the persons thereon as have cast anchor within the maritime belt or entered a port. On the other hand, the littoral State is not compelled to exercise such jurisdiction, and many States have therefore by commercial and consular treaties stipulated that in such cases as those in which the internal order of a ship is alone concerned, jurisdiction should be exercised, not by the littoral State, but by the home State through its consul \* \* \*.

In *The Exchange*, 7 Cranch. 135, 143, Mr. Chief Justice Marshall states the rule as follows:

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. \* \* \* When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purpose of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

Again in *The Eagle*, 8 Wall. 15, 22, the Supreme Court holds that:

All vessels entering into, or departing from, a domestic or foreign port are bound to obey the laws and well-known usages of the port,

and are subject to seizure and penalties for disobedience; and when submitting to them, they are entitled to all the protection which they afford.

That a ship is also subject to the jurisdiction and laws of the country under whose flag she sails is beyond question, and we need only cite the case of *United States v. Bowman*, just decided by this court, No. 69, October term, 1922. From this dual responsibility and jurisdiction it follows—

(1) That a merchant ship, wherever she goes, carries the laws of her country, and for a violation of them those on board may be subjected to punishment.

(2) When she enters the waters of another nation, however, she becomes also subject to the jurisdiction of the laws of the littoral state and is bound to conform to its commercial as well as its police and other regulations so long as she remains.

There seems to be no authority which challenges the right of the littoral state to jurisdiction of all matters which affect its peace, order, and security, as distinguished from matters wholly internal to the ship. The regulation of the liquor traffic has always been regarded as part of the police power, and to it, in the case of the States of the Union, there seems to have been practically no limit. *Crane v. Campbell*, 245 U. S. 304. With respect to interstate and foreign commerce the United States has always had plenary power, and the 18th amendment, whatever it may have done, has not limited its power.

Considered with reference to the importation clause of the amendment, the enforcement act becomes a smuggling statute also. We have, therefore, in addition to the well-known difficulties of enforcing prohibition, the age-long difficulty incident to smuggling. Can it be said, therefore, that liquor on board a ship is a matter solely of the internal regulation of the affairs of the ship?

The question of jurisdiction goes far beyond jurisdiction of the ship. It is rather jurisdiction of our ports and littoral waters. That we have such jurisdiction no one will question.

**It is not merely liquor on board a ship which offends our law, it is the challenge to our peace, order, security, and national policy of a ship within our waters laden with liquor.**

(Our waters and ports belong to us, not to the ship.) She uses them by our permission, not by her right, and when she uses them she must obey our laws or take the consequences. We could refuse to allow her to come. *Patterson v. The Eudora*, 190 U. S. 169. We can and do say how and when she shall come, what papers she shall bring, where she shall lie while in port, when, where, and how she shall discharge her cargo, and when and how she shall depart. No one would ever question our right, or the right of any nation, to prevent a vessel infected with typhus fever from lying alongside a dock. It is jurisdiction over our navigable waters, not over the internal affairs of a ship which we assert.

Our organic law has said that the manufacture, sale, importation, or exportation of liquor as a

beverage shall cease. And that applies throughout the United States and "all territory subject to the jurisdiction thereof." Congress, in its power to enforce that organic law, has said that the possession of liquor under other than limited conditions is a crime, and that any *place* where it is possessed in violation of those conditions is a nuisance. And that applies throughout the United States and "all territory subject to the jurisdiction thereof." Why, then, should it be said that vessels carrying it should be permitted to hover about our shores, anchor in our harbors, and lie alongside our wharves? Are not these "subject to the jurisdiction thereof"?

With "microscopic search" it is argued that the constitutional amendment does not prohibit the possession or use of liquor, but only prohibits sale, importation, or exportation, and if "the national prohibition act goes beyond the limits of the amendment, and prohibits mere possession, it is unsupported by the Constitution, and, to that extent at least, unenforcible." (Appellant's brief, pp. 73, 74.) But to forbid possession is a reasonable method of stopping sale, importation, and exportation.

As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. \* \* \* And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without

proper relation to the legitimate legislative purpose. *Crane v. Campbell*, 245 U. S. 304, 307.

The appellants urge that the courts never give a construction to a statute contrary to international law or the accepted custom and usage of civilized nations when it is possible reasonably to construe it in another manner, and they say that the same rule *a fortiori* should apply to the construction of a provision of the Constitution. But we must remember that—

The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. *Grogan and Anchor Line cases, supra.*

It applied to the United States and all territory subject to the jurisdiction thereof.

The amendment represents a declared policy of the country, contrary we may for the sake of argument admit, to the custom and usage of most civilized nations. It was declared by the supreme power of the people as part of their organic law, and it is the supreme law of the land. It binds legislatures, courts, officials, and individuals, and of its own force invalidates everything which authorizes that which it prohibits. *National Prohibition cases, supra.* What room is there here for spelling out a duty on the part of the court to conform or to construe this national policy so as to harmonize it with customs and usages



of nations whose policies are entirely different? Would any one say that the Thirteenth Amendment must be construed in accordance with the customs and usages of nations which include slavery among their policies? Slavery and liquor are now equally foreign to our lawful institutions. The constitutional ban admits of no compromise. The enforcement act is not a statute to regulate, it is a statute to prohibit. *Toleration in accordance with custom and usage may be consistent with regulation, but not with prohibition.* The national prohibition act, we submit, should be construed in accordance with the national policy, declared in the amendment, and by no other standard. If that policy is utterly to banish liquor as a beverage, and if the language of the enforcement act is, and since the act of 1921 it surely is, broad enough to cover all places subject to the jurisdiction of the United States, it should be so construed.

It is to be remembered that we are not considering here a revenue measure, or a patent law, involving merely individual rights (*Brown v. Duchesne*, 19 How. 183), or a commercial regulation; we are not concerned with the rights of seamen (*The State of Maine*, 22 Fed. 743; *The Kestor*, 110 Fed. 432; *Patterson v. The Eudora*, 190 U. S. 170; *Sandberg v. McDonald*, 248 U. S. 185; *Neilson v. Rhine Shipping Company*, 248 U. S. 105), nor with the immigration of contract laborers (*Scharrenberg v. Dollar Steamship Company*, 245 U. S. 122). We are not attempting to adjust a complicated problem involved in the seizure of vessels as prizes in time of war or under

embargo or nonintercourse statutes. (*The Habana*, 175 U. S. 677; *The Charming Betsy*, 2 Cranch 64.) We are enforcing a national policy, drastic, revolutionary, and, as its foremost proponents claim, evangelistic in its proclamation and purpose. We know of no consideration of comity or expediency which may be heard to weaken or interfere with it anywhere in "the United States or the territory subject to the jurisdiction thereof."

This court has already had "the routine arguments" pressed, that "this country does not undertake to regulate the habits of people elsewhere"; that it has "no interest in meddling with transportation across its territory if leakage in transit is prevented"; that the repeal of "statutes and *a fortiori* of treaties by implication is not to be favored," and that if the letter of the law seems to have that effect—"A thing may be within the letter yet not within the law when it has been construed"—and has given no uncertain answer.

### III.

**There is no distinction between cargo and sea stores which would distinguish liquor carried as such from liquor carried as cargo, or which would indicate that liquor carried as sea stores is intended by Congress to be exempt from the provisions of the 18th amendment and the national prohibition act.**

The collection act of March 2, 1799, whose provisions were incorporated in the Revised Statutes, has until recently contained the regulations for the

manifesting of cargo and sea stores. Section 2806, Revised Statutes, provided that no merchandise should be brought into the United States from any foreign port in any vessel without a manifest in writing of the cargo signed by the master. Section 2807 set forth what must be included in the manifest, and one thing was "an account of the sea stores remaining, if any." Sections 2795, 2796, and 2797 further particularized the requirements in manifesting sea stores in order to prevent the importation of such sea stores. Section 2795 was as follows:

In order to ascertain what articles ought to be exempt from duty as the sea stores of a vessel, the master shall particularly specify the articles in the report or manifest to be by him made, designating them as the sea stores of such vessel; and in the oath to be taken by such master, on making such report, he shall declare that the articles so specified as sea stores are truly such, and are not intended by way of merchandise or for sale; whereupon the articles shall be free from duty.

By section 2796, if it appeared to the collector that the quantities of articles reported as sea stores were excessive, the collector could estimate the amount of the duty on the excess, which should forthwith be paid on pain of forfeiture. Section 2797 provided that if any articles were found on board as sea stores other than those specified, or if they were landed without a permit, all such articles should be forfeited. Section 2775 reads as follows:

The master of any vessel having on board distilled spirits or wines shall, within forty-

eight hours after his arrival, whether the same be at the first port of arrival of such vessel or not, in addition to the requirements of the preceding section, report in writing to the surveyor or officer acting as inspector of the revenue of the port at which he has arrived, the foreign port from which he last sailed, the name of his vessel, his own name, the tonnage and denomination of such vessel, and to what nation belonging, together with the quantity and kinds of spirits and wines on board of the vessel, particularizing the number of casks, vessels, cases, or other packages containing the same, with their marks and numbers, as also the quantity and kinds of spirits and wines on board such vessel as sea stores, and in default thereof he shall be liable to a penalty of five hundred dollars, and any spirits omitted to be reported shall be forfeited.

It is obvious that sea stores, therefore, have always been treated in our customs laws in the same manner as cargo. They were to be manifested and, if landed without a permit, forfeited. Liquors as sea stores were covered by special requirements and were to be reported with the other liquors on board.

Nor is it true, as claimed, that sea stores have always been regarded as part of the ship. A ship and the things on board other than passengers' baggage have always been, by the customs laws at least, classified under three heads, (1) the ship, its tackle, apparel, and furniture, (2) its cargo, (3) its sea stores. See sections of the Revised Statutes referred to *supra*; *United States v. 24 Coils Cordage*,

28 Fed. Cas. 276; *United States v. 1 Hempen Cable*, 27 Fed. Cas. 26. In the latter case Judge Davis, in the District court of Massachusetts, considering the customs laws and referring to sea stores, said that the words "sea stores" were applicable "not to the tackle and apparel of the ship, furniture, sails, rigging, cables, or anchors. These are to be considered as attached to the ship and so belonging to the ship that it is no more necessary to include them in the manifest than the ship itself."

The tariff act of Sept. 21, 1922, in its later sections, revised the collection act of May 2, 1799, incorporated in the Revised Statutes. By section 642 of the act of 1922 sections 2775, 2795, 2796, 2797, 2806, and 2809 of the Revised Statutes were repealed. The fact that section 2775 was repealed is convincing evidence that Congress did not intend that liquor should be carried either as cargo or as sea stores. This is particularly suggestive when we consider that, in the later sections of the tariff act of 1922, most of the provisions of the old act of 1799 were reenacted in one form or another with the exception of those which had to do with liquor. Can it reasonably be said that a Congress which revised the old collection act and left out of it all provisions for manifesting liquors, and showed its intention to make the old sections comply with present conditions, intended that liquors might be carried as ships' stores? Nowhere either in the old act or the new is there any limitation upon the amount of merchandise which can be carried as sea stores. Is it

reasonable to suppose that Congress intended to allow a vessel to carry as sea stores any amount of liquor which she might choose, to stay in our ports with it as long as she chose, with only a penalty of having it treated as imported merchandise if any of it was landed? It would seem to follow by necessary implication that if Congress, when it passed the tariff act of September 21, 1922, and repealed the provisions of section 2775 of the Revised Statutes specifically providing for reporting liquors forming part of the sea stores of a vessel, had intended to allow such liquors to be included as sea stores, it would have made some specific provision for them, including the amount which might be carried, and carefully drawn safeguards against smuggling.

#### IV.

##### **Summary and conclusion.**

Our construction of the enforcement laws must follow the policy of our country declared in the eighteenth amendment. The language of the statutes is broad enough to give complete effect to that policy wherever the jurisdiction of the United States extends. It should therefore be given such effect. That it may cause loss is evident. That it may offend friends beyond the sea is indeed regrettable. The difficulties, however, are probably greater in imagination than they will prove to be in reality. We have no reason to believe that the Governments of Italy and France will object to recasting their

shipping regulations so as to conform to our law as soon as that law is settled by this court. And, beyond all question, our Constitution can not be made to yield to their shipping regulations. Surely, those nations would not tolerate the commission in their ports by foreign vessels of what their law regards as nuisances, and they will readily see the impropriety of allowing their vessels thus to offend in our ports.

The judgments appealed from, therefore, should be affirmed.

JAMES M. BECK,

*Solicitor General.*

MABEL WALKER WILLEBRANDT,

*Assistant Attorney General.*

ALFRED A. WHEAT,

*Special Assistant to the Attorney General.*

DECEMBER, 1922.







# IN THE Supreme Court of the United States

OCTOBER TERM, 1922

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HENDERSON BROTHERS) LTD.,	Appellants,	#659.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
OCEANIC STEAM NAVIGATION COMPANY, LTD.,	Appellants,	#660.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
INTERNATIONAL NAVIGATION COMPANY, LTD.,	Appellants,	#661.
against		
HENRY C. STUART, et. al.,	Appellees.	
COMPAGNIE GENERALE TRANSATLANTIQUE,	Appellants,	#662.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
THE NETHERLANDS AMERICAN STEAM NAVIGATION COM- PANY (HOLLAND AMERICAN LINE),	Appellants,	#666.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
LIVERPOOL BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY, LTD.,	Appellants,	#667.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
THE ROYAL MAIL STEAM PACKET COMPANY,	Appellants,	#668.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
UNITED STEAMSHIP COMPANY OF COPENHAGEN (SCANDI- NAVIAN AMERICAN LINE),	Appellants,	#669.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
THE PACIFIC STEAM NAVIGATION COMPANY,	Appellants,	#670.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
NAVIGAZIONE GENERALE ITALIANA,	Appellants,	#678.
against		
ANDREW W. MELLON, et. al.,	Appellees.	

PLEASE TAKE NOTICE that on Monday, November 13, 1922, at twelve o'clock noon, or as soon thereafter as counsel may be heard, the appellants herein will submit to the Supreme Court of the United States a motion, a copy of which is hereto annexed, petitioning said Court to advance the above entitled cause for early hearing.

Dated, November 1, 1922.

GEORGE W. WICKERSHAM,  
*Counsel for Appellants,*  
Office and P. O. Address,  
No. 40 Wall Street,  
Borough of Manhattan,  
City of New York.

To

HON. HARRY M. DAUGHERTY,  
*Attorney General of the United States,*  
*Attorney for Appellees.*

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HENDERSON BROTHERS) LTD.,	Appellants,	#659.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
OCEANIC STEAM NAVIGATION COMPANY, LTD.,	Appellants,	#660.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
INTERNATIONAL NAVIGATION COMPANY, LTD.,	Appellants,	#661.
against		
HENRY C. STUART, et. al.,	Appellees.	
COMPAGNIE GENERALE TRANSATLANTIQUE,	Appellants,	#662.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
THE NETHERLANDS AMERICAN STEAM NAVIGATION COM- PANY (HOLLAND AMERICAN LINE),	Appellants,	#666.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
LIVERPOOL BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY, LTD.,	Appellants,	#667.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
THE ROYAL MAIL STEAM PACKET COMPANY,	Appellants,	#668.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
UNITED STEAMSHIP COMPANY OF COPENHAGEN (SCANDI- NAVIAN AMERICAN LINE),	Appellants,	#669.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
THE PACIFIC STEAM NAVIGATION COMPANY,	Appellants,	#670.
against		
ANDREW W. MELLON, et. al.,	Appellees.	
NAVIGAZIONE GENERALE ITALIANA,	Appellants,	#678.
against		
ANDREW W. MELLON, et. al.,	Appellees.	

*On Appeal from The District Court of The United States for The Southern District of New York.*

The Appellants move that these causes be advanced for hearing at an early date. These appeals are taken from final decrees of the District Court of the United States for the Southern District of New York in each case, dismissing the bill of complaint.

The bills of complaint prayed for an injunction restraining defendants from enforcing, or attempting to enforce against the various complainants, any of the forfeitures or penalties provided for in the National Prohibition Act by reason of the carriage by their vessels within the territorial waters of the United States of intoxicating liquor as sea stores intended for the use of passengers and crew of said vessels outside the territorial waters of the United States.

Complainants are foreign corporations and their vessels all fly foreign flags and are owned and registered in foreign countries.

The bills of complaint were filed to restrain the threatened acts of the defendants to make and carry out orders following an Opinion of the Attorney General of the United States, which held that foreign vessels were violating the provisions of the Eighteenth Amendment and the National Prohibition Act by keeping on board while in the territorial waters of the United States sea stores including intoxicating liquors intended for use by passengers and crew without the jurisdiction of this country.

This ruling is contrary to the opinion of a prev-

ious Attorney General and to existing regulations of the Secretary of the Treasury.

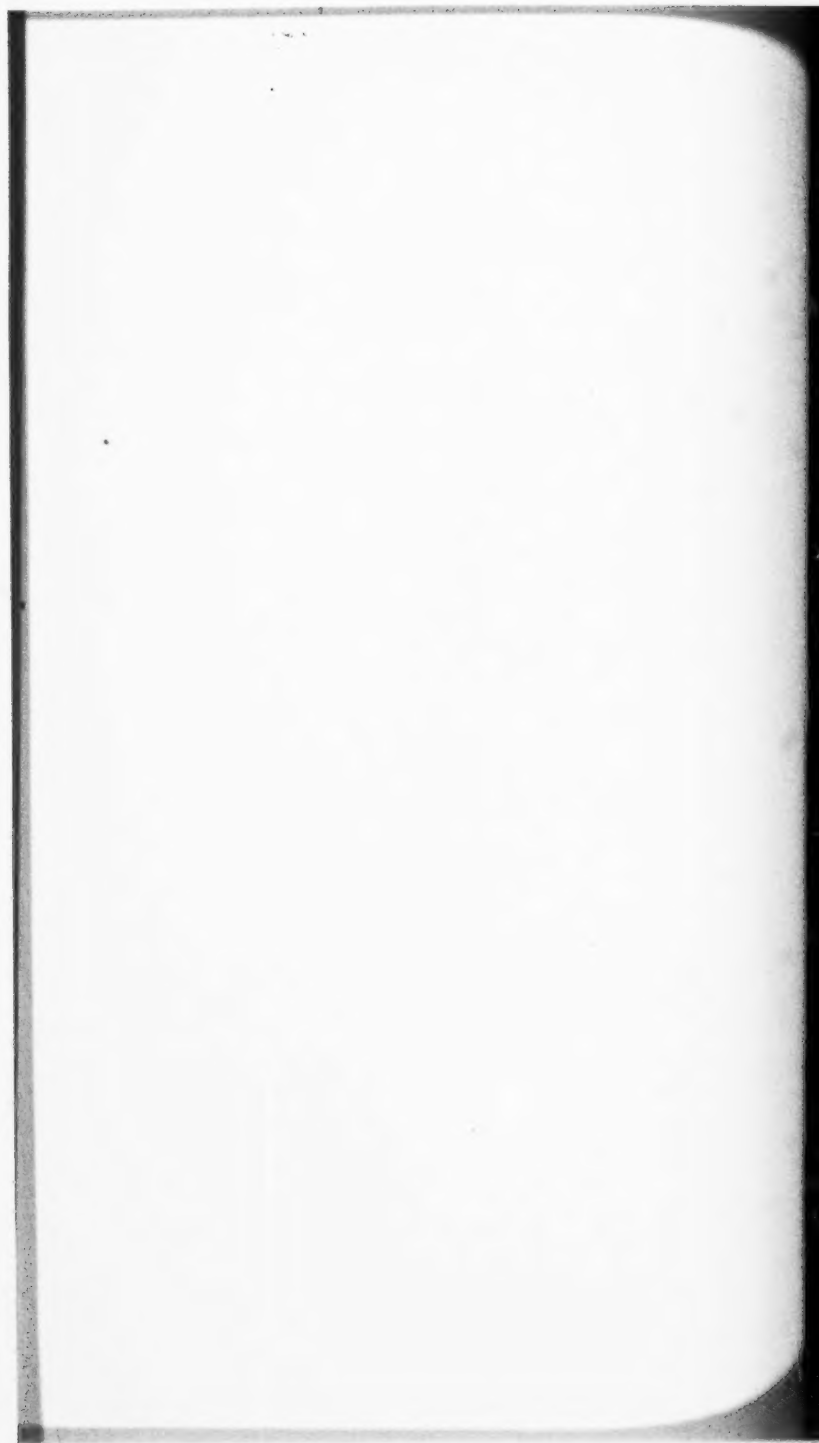
The necessary jurisdictional facts appear in the Bills of Complaint and the Secretary of the Treasury voluntarily appeared and submitted himself to the jurisdiction of the court.

The decision of the District Court, from which this appeal is taken, affects all foreign vessels of every nation touching at ports of the United States.

Due notice of the presentation of this motion has been given to the Attorney General of the United States, counsel for appellees.

An early hearing of this appeal is therefore desirable in the public interest, as well as in the interest of complainants and all other foreign steamship lines similarly situated.

GEORGE W. WICKERSHAM,  
*Counsel for Appellants.*



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# In the Supreme Court of the United States.

OCTOBER TERM, 1922.

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INTERNATIONAL MERCANTILE MARINE COM- pany, appellant, v. H. C. STUART, ACTING COLLECTOR, ETC., et al.	}	No. 693.
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UNITED AMERICAN LINES, INCORPORATED; Atlantic Mail Corporation, American Ship & Commerce Navigation Corpora- tion, et al., appellants, v. HENRY C. STUART, ACTING COLLECTOR, etc., et al.	}	No. 694.
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*APPEALS FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

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## BRIEF ON BEHALF OF APPELLANTS.

These are appeals from final decrees of the United States District Court for the Southern District of New York dismissing bills of complaint filed against the defendants who are officers of the United States charged with the duty of enforcing the National Prohibition law.

The relief asked in No. 693, the *International Mercantile Marine Company case*, is an injunction restraining the defendants (1) from enforcing or attempting to enforce against the complainant or its steamships any of the seizures, pains, forfeitures, and penalties provided in the National Prohibition Act or in laws, or in regulations of the Secretary of the Treasury; (2) from arresting and prosecuting the complainant, its officers, etc., for or on account of the alleged violations by them of the regulations or of acts of Congress on the ground or claim of having intoxicating liquors on board complainants' vessels as sea stores while in the port of New York; (3) from refusing to issue to the complainants or its ships permits for clearance from the port of New York, or in any way interfering with the arrival or departure of the steamships with liquor on board sealed as sea stores; (4) from seizing, molesting, or otherwise interfering with the complainants in the peaceful possession of said intoxicating liquors on board its vessels as part of their sea stores; (5) from enforcing against the complainant or its steamers any of the penalties provided in the acts of Congress or the regulations of the Secretary of the Treasury by reason of any sale of liquor carried as sea stores which may be made on the high seas or in foreign ports.

The relief asked in the bill in No. 694, the *United American Lines case*, is substantially the same, and in addition asks an injunction against the defendants from arresting and prosecuting the complainants.

their officers, agents, etc., or from attempting any seizure or forfeiture of any intoxicating liquors carried as sea stores on board certain-named steamships of the complainants, or the said steamships, by reason of the fact that such intoxicating liquors may be sold on the high seas and in foreign ports and outside the territorial waters of the United States.

These cases raise the question of the right of American ships to carry intoxicating liquors designed for beverage purposes as part of their sea stores within the territorial waters of the United States, and to sell and furnish them to passengers and crew upon the high seas and in foreign ports.

Each of the complainants is an American corporation, and its ships are of American registry regularly plying between the port of New York and foreign ports, and, in the case of the United American Lines, two of the ships have been chartered for cruises between January and May, 1923, one for an around the world cruise and the other for a cruise to South America and the West Indies. The facts alleged as grounds for the relief asked are in substance these:

(1) That for a long time in connection with the operation of the steamships the complainants have kept as part of the regular sea stores of their vessels wines and other intoxicating liquors, which were sold in foreign ports and on the high seas for the convenience of their passengers, many of whom are of nationalities who habitually use them as part of their regular diet; that the beverages are lawfully acquired, and there is nothing in the Eighteenth Amendment or

the National Prohibition Act which prevents their use as aforesaid, and therefore that the enforcement of the prohibition law and regulations against them or their ships because of the possession and use of the liquor would be unlawful and would cause them irreparable damage, for which they have no adequate remedy at law. The answers merely deny the conclusions and equities of the bills.

The only substantial difference in the facts between these cases and the cases of the Cunard Steamship Company and other foreign companies is that these ships are American ships, sailing under the American flag and operated by American companies. The purpose for which the liquor is to be used is the same, that is, it is to be used as a beverage by people who are accustomed so to use it.

#### THE ISSUE.

The amendment is aimed at the use of liquor for "beverage purposes." The meaning of these words is well understood, but it may be well to note that the noun *beverage* is defined in the *Standard Dictionary* as: "Drink; that which is drunk; especially a pleasant or refreshing drink, or a habitual one." The vicious thing, therefore, is drinking intoxicants for pleasure, refreshment, or from habit. The definition could not have been phrased more exactly to fit the facts alleged in the bills. The claim is that the officers of the United States intend to prevent the ships from furnishing liquor to passengers and crew who habitually drink it for pleasure and re-

freshment, and the court is asked to construe the Amendment and the enforcement act so as to permit them to bring and have liquor for that purpose within our ports and littoral waters freely and without molestation and to sell it on the high seas and in foreign ports.

#### ARGUMENT.

##### I.

The eighteenth amendment and the national prohibition act require the application of prohibition to every place where the United States may exercise its jurisdiction.

The first section of the Eighteenth Amendment is as follows:

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The things prohibited are—

- (1) Manufacture,
- (2) Sale,
- (3) Transportation,
- (4) Importation into, and
- (5) Exportation from.

The subject of the prohibition is intoxicating liquors for beverage purposes.

The place of the prohibition is "the United States and all territory subject to the jurisdiction thereof."

By section 2 Congress is given power to enforce the article by appropriate legislation.

Congress, therefore, has express power in its discretion to enact all laws which it may deem desirable or necessary to accomplish the purpose of section 1 of the amendment.

**The enforcement statutes.**

Congress has passed two acts to enforce the amendment, the National Prohibition Act (41 Stats. part 1, p. 305) and an act supplemental thereto (act of November 23, 1921, c. 134).

The National Prohibition Act is entitled—

An act to prohibit intoxicating beverages and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries.

Section 3 of Title II of that act provides:

No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported,

imported, exported, delivered, furnished, and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: \* \* \*

While the act makes provision for the use of intoxicants for medicinal and sacramental purposes, it nowhere contains any provision whereby their use for beverage purposes is made lawful in any place except a private dwelling for the personal consumption of the owner, his family, and his bona fide guests. (Sec. 33, Title II.)

By section 17 it is made unlawful to advertise anywhere, or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the same, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises.

By section 18 of Title II it is unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor, and by section 19 no person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of the act.

By section 21 it is provided:

Any room, house, building, *boat, vehicle, structure, or place* where intoxicating liquor

is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, *boat, vehicle, structure, or place* is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction. (Italics ours.)

By section 25 it is unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, "*and no property rights shall exist in any such liquor or property.*" This section provides for the issuance of search warrants and contains a proviso that no search warrants shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of liquor, or unless it is in part used for some business purpose, and the term "private dwelling" is



to be construed to include the "room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house."

Section 33 of the act provides as follows:

After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.

The act may be searched in vain for any provision which allows anyone to have liquor for beverage purposes anywhere except in his dwelling. There is

nowhere the suggestion that vessels in our waters enjoy any immunity.

Even the use of liquor as medicine by the sick is drastically restricted.

Under section 7 of Title II not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days, and no prescription shall be filled more than once, and no one but a physician holding a permit to prescribe liquor shall make any such prescription.

By act of November 23, 1921, c. 134, entitled "An act supplemental to the national prohibition act," it was provided in section 3:

That this act and the national prohibition act shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; \* \* \*

Section 2 provides that only spirituous and vinous liquor may be prescribed for medicinal purposes, and that no physician shall prescribe any vinous liquor containing more than 24 per cent alcohol by volume, or on any prescription more than one-fourth of a gallon of vinous liquor, or any vinous or spiritous liquor containing separately or in the aggregate more than one-half pint of alcohol for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, unless on application it shall be clearly apparent to the com-

missioner that, for some extraordinary reason, a larger amount is necessary. Under the same section, no spirituous liquor shall be imported into the United States, nor shall any permit be granted authorizing the manufacture of any spirituous liquor save alcohol, until the amount of such liquor now in distilleries or other bonded warehouses shall have been reduced to a quantity that, in the opinion of the commissioner will, with liquor that may thereafter be manufactured and imported, be sufficient to supply the current need thereafter for all nonbeverage uses, and no vinous liquor shall be imported into the United States unless it is made to appear to the commissioner that vinous liquor for such nonbeverage use, produced in the United States, is not sufficient to meet such nonbeverage needs. The use of alcoholic liquors for medicinal purposes is thus more drastically restricted, and, whatever may have been true before, since the passage of the act of 1921 the National Prohibition Act now applies not only to the United States *but to all territory subject to its jurisdiction*. Its application is, therefore, coextensive with the amendment itself, and if the amendment applied wherever the jurisdiction of the United States extends, the enforcement act has now the same application.

**The purpose of the amendment.**

The purpose or intent of the States in adopting the Eighteenth Amendment and that of the legislative body in initiating it, must be considered in the light

of "the mischief to be prevented" (*Craig v. Missouri*, 4 Pet. 410, 431), the subject, the context, and the intention of the body inserting the word in the Constitution (*McCulloch v. Maryland*, 4 Wheat. 316), "all the aids and lights of contemporary history" (*Kendall v. United States ex rel. Stokes*, 12 Pet. 524), "in connection with the known condition of affairs out of which the occasion for its adopting may have arisen \* \* \* in a way, so far as is reasonably possible to forward the known purpose or object for which the amendment was adopted" (*Maxwell v. Dow*, 176 U. S. 581).

The history of the movement which led to the adoption of the 18th Amendment is a matter of common knowledge, and, whether one agrees with the principle or not, we all recognize the fact that it represents the culmination of a nation-wide movement which had been going on in the United States for many years prosecuted with a zeal which amounted in some cases to the spirit of religious fervor, opposed with a bitterness equally zealous by those who denounced it as subversive of personal rights and liberties, but aimed at the total eradication of the use of alcoholic liquors of every kind and under all circumstances, except for strictly limited medicinal and sacramental purposes. It was essentially a moral crusade under religious leadership, frankly intended to save the people from a habit believed to be the chief cause of crime, poverty, and misery. It took no account of property rights and allowed no room for differences of opinion. Believing as they did, that the

use of liquor did more than any other one thing to debauch and degrade our manhood and womanhood, the advocates of prohibition contended that whatever material hardship might be the direct or indirect result of prohibition, it would count as nothing in view of the evils to be removed and the blessings to follow.

It must be remembered that at the time the amendment was adopted over thirty of the forty-eight States already had absolutely prohibited the liquor traffic, and that all of them had in some measure restrained it. It was well established, as a matter of law, that each State had plenary power to prohibit the traffic and the use, and the Federal Government had, within the limits imposed by the Constitution, lent its aid to the States in their efforts to bring about absolute prohibition. Nevertheless, its advocates were not satisfied and, naturally, for the traffic which they sought to destroy still flourished. Believing that the final destruction of the use of liquor for beverage purposes was necessary to the peace and good order of the country and of the world, they felt that that result could only be accomplished by an Amendment which would bring to its destruction the full power of the Nation.

Finally it was ratified by forty-five of the forty-eight States. Undoubtedly, when the Amendment thus became an accomplished fact, those who had striven mightily for the result believed that never again, anywhere where the power of the United States could be exerted by law, would the drinking

of liquor be lawful. Prohibition was now a fact, throughout the "United States and all territory subject to the jurisdiction thereof." They must have experienced an exaltation of spirit similar to that which moved Mr. Justice Miller in the *Slaughterhouse cases* to say of the war between the States, followed by the 13th Amendment (16 Wall. 36, 68):

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict.  
\* \* \* Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

After quoting the amendment, he continues:

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this Government—a declaration designed to establish the freedom of four million slaves—and with microscopic search endeavor to find in it a reference to servitudes, which have been attached to property in certain localities, requires an effort, to say the least of it.

Anyone reading the language of the Eighteenth Amendment in the light of the history of the times must read indeed "with microscopic search" to find in the purpose of the amendment anything less complete than the commitment of the United States as a nation unalterably to the policy of suppressing with

all its power the drinking of liquor for pleasure, refreshment, or from habit in every place to which its jurisdiction extended. Throughout the jurisdiction of the United States drinking as a "legalized social custom" was to perish under the iron heel of the law.

This court has recognized the force of this contention in *Grogan v. Walker*, and *Anchor Line v. Aldridge*, decided May 15, 1922. In those cases the court held that the transportation of intoxicants from a foreign port through some part of the United States to another foreign port, and the transshipment of intoxicants from a vessel in a port of the United States to another vessel bound for a foreign port, was a violation of the National Prohibition Act.

In those cases Mr. Justice Holmes, speaking for the court, said of the National Prohibition Act:

All the provisions of this act are to be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

The routine arguments are pressed that this country does not undertake to regulate the habits of people elsewhere, and that the references to beverage purposes and use as a beverage show that it was not attempting to do so; that it has no interest in meddling with transportation across its territory if leakage in transit is prevented, as it has been; that the repeal of statutes and *a fortiori* of treaties by implication is not to be favored; and that even if the letter of a law seems to have that effect a thing may be within the letter yet not within

the law when it has been construed. We appreciate all this, but are of opinion that the letter is too strong in this case.

The eighteenth amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute books. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True, this discouraged production here, but that was forbidden already, and the provision applied to liquors already lawfully made. See *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 151, n. 1. It is obvious that those whose wishes and opinions were embodied in the amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay.

The vigor of the dissent in that case but lends emphasis to the position taken by the court. The object of the Amendment and the National Prohibition Act was to stop the whole business.

*And this applies throughout the United States and all territory subject to the jurisdiction thereof.*

It is our contention that the matters decided by this court in the *Grogan* and *Anchor Line* cases not only compelled the Attorney General, in compliance with his oath of office, to give to the Secretary of the Treasury the advice which is at the basis of these actions, but that they require an affirmance of the



decrees herein rendered. Judge Hand so regarded them, and his interpretation of their effect seems to us unanswerable. In his opinion in the case of the foreign ships he says (see record in No. 693, pp. 28 *et seq.*):

*Grogan v. Walker, supra*, and *Anchor Line v. Aldridge, supra*, plainly meant to adopt a broad canon for the interpretation of the national prohibition act, following the admonition at the end of the first paragraph of section three. Effecting a revolutionary reform in the habits of the Nation, the statute is to be understood as thoroughgoing in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the amendment, and its very want of particularity is a good index that it meant to cover what it could. For this reason it is distinguished from earlier local acts of the same kind, as, for example, the Alaskan prohibition act, upon the language of section twenty-nine of which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I can not read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Under the facts of those cases there was no conceivable danger in the transit of liquor, except the

chance of its escape, that some of the liquor might not complete its passage. In the cases at bar the danger of an escape is equally present, and in the case of corporations less responsible than the appellants the danger might be great indeed. He then continues:

The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of the stocks are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the amendment to prevent drinking liquors.

Naturally, I have nothing to say about the wisdom of the amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disin-

terested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol.

This court said in the *National Prohibition cases*, 253 U. S. 350, 386, that the first section of the amendment is operative throughout the entire territorial limits of the United States and binds all legislative bodies, courts, and public officers. With such an obligation binding the Attorney General, and with the decision of this court in the *Grogan* and *Anchor Line* cases before him, how could he, mindful of his oath of office, advise the Secretary of the Treasury that he had the power to prepare and promulgate rules and regulations permitting ships to bring to our ports liquor for beverage purposes and openly prepare, within the jurisdiction of the United States, for the gratification by its citizens of exactly those appetites which it was the avowed intent of the Constitution to deny?

## II.

**Violations of the national prohibition act committed on the high seas and in foreign ports are punishable as offenses against the United States.**

If we are right in our contention that the Eighteenth Amendment and the enforcement acts are broad enough in language and intent to make the policy of prohibition effective wherever the jurisdiction of the United States extends, then they apply to American ships on the high seas and in foreign ports. That the jurisdiction of the United States is thus extensive is not open to question. The opinion of the Attorney General which brought about the present controversy covers completely both the question of jurisdiction and the question of its application to American ships under the enforcement acts. It is printed in the appendix hereto and will serve as our argument on this phase of the case, except for the application of the decision of this court in the case of *United States v. Bowman*, decided November 13, 1922, after the opinion was given. In passing it may be noted, however, that the jurisdiction asserted is not new, having been recognized in the statutory law of the United States ever since the judiciary act of September 24, 1789.

In the *Bowman case* it was held that section 35 of the Criminal Code relating to conspiracies to defraud the United States applied to such a conspiracy begun on board an American vessel on a voyage from New York to Rio Janeiro. The court below, while admitting the jurisdiction, had held that sec-

tion 35 of the Criminal Code could not be given application to the high seas because wherever Congress had intended such a result it had said so expressly and that the offenses enumerated in the chapter of the Criminal Code which included section 35 did not contain the appropriate and necessary language. This court, however, refused to follow that reasoning and said that—

the necessary *locus*, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.

The principle of that case would seem to be this: That when general words are used to define crimes and to provide for their punishment, they will be held to cover offenses wherever committed within the jurisdiction of the United States, if those offenses are such as do not depend for their criminal nature upon the locality where they are committed and are offenses against the peace, security, dignity, or sovereignty of the nation. Of offenses of this class, as distinguished from crimes against individuals and their property, the court said:

But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if

committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

The court then enumerates many offenses included in chapter 4 of the Criminal Code, which bears the title "Offenses against the operations of the Government." These offenses, in some cases, like the certification of a false invoice by a consul, must clearly be committed in a foreign country. In the case of such offenses as forging or altering a ship's papers it could not be said that because Congress did not fix any *locus* for the crime it intended to exclude the high seas. By the same reasoning it would seem to follow that such offenses as enticing desertions from the naval service, bribing a United States officer, willfully doing any act relating to the bringing in, custody, sale, or disposition of property captured as a prize, with intent to injure or defraud the United States, and stealing or illegally using ordnance, arms, ammunition, etc., furnished or to be

used for military or naval service would not fail to be violations of the statute because committed in foreign countries or on the high seas. The court concludes that section 35 of the Criminal Code, therefore, covered the offenses enumerated when committed on American ships upon the high seas, for it was directed generally against "whoever" did any of the prescribed acts.

If we are correct in our assumption that the purpose of the Eighteenth Amendment was to commit the United States, as a nation, unalterably to the policy of suppressing, with all its power, the drinking of liquor as a beverage in every place to which its jurisdiction extends, and that the enforcement act, as supplemented by the act of November 23, 1921, makes it applicable not only to the United States but to all territory subject to its jurisdiction, it would seem to follow that the general words of the act are sufficient to imply a purpose in Congress to make the acts denounced as criminal punishable wherever committed within the jurisdiction of the United States, including its own ships wherever they may be. It seems to us that there can be no doubt whatever that the act was intended to apply to the ports and littoral waters of the country. Even in the limited sense, they are part of our "territory." The bringing of liquor within our harbors, the storage of it on vessels and the carrying of it thence with open intent to use it for a condemned purpose would plainly constitute a direct menace to the national policy

of prohibition as an internal condition of the country. The notorious difficulties in the enforcement of such laws, combined with the equally notorious difficulty in preventing smuggling, give all too plainly the promise that some of the liquor on board the ships is almost certain to find its way ashore.

While this special argument may not apply to liquor taken on board in a foreign port and used while at sea and in foreign ports, yet the purpose to destroy drinking in all places subject to our jurisdiction remains. Section 20 of the National Prohibition Act, providing for the enforcement of prohibition within the Canal Zone, contains a proviso that the section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad. From this exception it is argued that Congress did not intend to interfere with the possession and transportation of liquor under circumstances which, in its judgment, did not seem to imperil our national policy. But we are not concerned now with the transportation of commercial cargoes between foreign ports and through a canal which we are bound as a nation to maintain as a free interoceanic highway for the commerce of the world. Our concern is with liquor carried solely to be drunk as a beverage on our ships and with the legality of open bars under our flag. It is no one's business but ours, and we are a dry nation. The case is well stated by Judge Hand, as follows (*International Mercantile Marine Company case*, No. 693, p. 23):

It would be a curious thing if a country professing under its fundamental law to forbid



the use of intoxicants were to allow them without stint upon ships that sailed under its flag. The only distinction pressed is the disastrous consequences to an American merchant marine if of all ships at sea ours alone are within this ban. In the first place, the discrimination applies only to passenger vessels, which are a small part of any merchant marine. The whole argument is, however, misconceived. The eighteenth amendment involved the destruction at a blow of property values far greater than that of the whole passenger fleet. The motives which directed it disregarded ordinary commercial interests; it was a reform based upon the belief that the use of alcohol was one of the great evils of modern life, against whose utter extirpation no present rights of property might stand. (*National Prohibition cases, supra*, tenth conclusion.) And while a merchant marine may be thought to have a national importance, quite independent of the property involved in it, a court may not imply exceptions in the language of a constitution based upon its estimate of the relative advantages of what it will realize and what it will destroy.

I conclude, therefore, that a ship of American registry at sea or within a foreign port is within the scope of the amendment and of section three, and that the bills must be dismissed.

## III.

**There is no distinction between cargo and sea stores which would distinguish liquor carried as such from liquor carried as cargo, or which would indicate that liquor carried as sea stores is intended by Congress to be exempt from the provisions of the 18th amendment and the national prohibition act.**

The collection act of March 2, 1799, whose provisions were incorporated in the Revised Statutes, has until recently contained the regulations for the manifesting of cargo and sea stores. Section 2806, Revised Statutes, provided that no merchandise should be brought into the United States from any foreign port in any vessel without a manifest in writing of the cargo signed by the master. Section 2807 set forth what must be included in the manifest, and one thing was "an account of the sea stores remaining, if any." Sections 2795, 2796, and 2797 further particularized the requirements in manifesting sea stores in order to prevent the importation of such sea stores. Section 2795 was as follows:

In order to ascertain what articles ought to be exempt from duty as the sea stores of a vessel, the master shall particularly specify the articles in the report or manifest to be by him made, designating them as the sea stores of such vessel; and in the oath to be taken by such master, on making such report, he shall declare that the articles so specified as sea stores are truly such, and are not intended by way of merchandise or for sale; whereupon the articles shall be free from duty.

By section 2796, if it appeared to the collector that the quantities of articles reported as sea stores were excessive, the collector could estimate the amount of the duty on the excess, which should forthwith be paid on pain of forfeiture. Section 2797 provided that if any articles were found on board as sea stores other than those specified, or if they were landed without a permit, all such articles should be forfeited. Section 2775 reads as follows:

The master of any vessel having on board distilled spirits or wines shall, within forty-eight hours after his arrival, whether the same be at the first port of arrival of such vessel or not, in addition to the requirements of the preceding section, report in writing to the surveyor or officer acting as inspector of the revenue of the port at which he has arrived, the foreign port from which he last sailed, the name of his vessel, his own name, the tonnage and denomination of such vessel, and to what nation belonging, together with the quantity and kinds of spirits and wines on board of the vessel, particularizing the number of casks, vessels, cases, or other packages containing the same, with their marks and numbers, as also the quantity and kinds of spirits and wines on board such vessel as sea stores, and in default thereof he shall be liable to a penalty of five hundred dollars, and any spirits omitted to be reported shall be forfeited.

It is obvious that sea stores, therefore, have always been treated in our customs laws in the same manner as cargo. They were to be manifested and, if landed

without a permit, forfeited. Liquors as sea stores were covered by special requirements and were to be reported with the other liquors on board.

Nor is it true, as claimed, that sea stores have always been regarded as part of the ship. A ship and the things on board other than passengers' baggage have always been, by the customs laws at least, classified under three heads, (1) the ship, its tackle, apparel, and furniture, (2) its cargo, (3) its sea stores. See sections of the Revised Statutes referred to *supra*; *United States v. 24 Coils Cordage*, 28 Fed. Cas. 276; *United States v. 1 Hempen Cable*, 27 Fed. Cas. 26. In the latter case Judge Davis, in the District court of Massachusetts, considering the customs laws and referring to sea stores, said that the words "sea stores" were applicable "not to the tackle and apparel of the ship, furniture, sails, rigging, cables, or anchors. These are to be considered as attached to the ship and so belonging to the ship that it is no more necessary to include them in the manifest than the ship itself."

The tariff act of 1922, in its later sections, revised the collection act of March 2, 1799, incorporated in the Revised Statutes. By section 642 of the act of 1922 sections 2775, 2795, 2796, 2797, 2806, and 2809 of the Revised Statutes were repealed. The fact that section 2775 was repealed is convincing evidence that Congress did not intend that liquor should be carried either as cargo or as sea stores. This is particularly suggestive when we consider

that, in the later sections of the tariff act of 1922, most of the provisions of the old act of 1799 were reenacted in one form or another with the exception of those which had to do with liquor. Can it reasonably be said that a Congress which revised the old collection act and left out of it all provisions for manifesting liquors, and showed its intention to make the old sections comply with present conditions, intended that liquors might be carried as ships' stores? Nowhere either in the old act or the new is there any limitation upon the amount of merchandise which can be carried as sea stores. Is it reasonable to suppose that Congress intended to allow a vessel to carry as sea stores any amount of liquor which she might choose, to stay in our ports with it as long as she chose, with only a penalty of having it treated as imported merchandise if any of it was landed? It would seem to follow by necessary implication that if Congress, when it passed the tariff act of September 21, 1922, and repealed the provisions of section 2775 of the Revised Statutes specifically providing for reporting liquors forming part of the sea stores of a vessel, had intended to allow such liquors to be included as sea stores, it would have made some specific provision for them, including the amount which might be carried, and carefully drawn safeguards against smuggling.

## IV.

**Summary and conclusion.**

Our construction of the enforcement laws must follow the policy of our country declared in the Eighteenth Amendment. The language of the statutes is broad enough to give complete effect to that policy wherever the jurisdiction of the United States extends. It should therefore be given such effect. That it may cause loss and confusion is evident. That it should upset established custom was its purpose. That it may interfere with development of our cherished merchant marine is deplorable. But if—

To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all (4 Pet. 432),

the people made the Eighteenth Amendment a part of their organic law, the courts—

can listen only to the mandates of law, and can tread only that path which is marked out by duty (4 Pet. 438).

The judgments appealed from, therefore, should be affirmed.

JAMES M. BECK,

*Solicitor General.*

MABEL WALKER WILLEBRANDT,

*Assistant Attorney General.*

ALFRED A. WHEAT,

*Special Assistant to the Attorney General.*

DECEMBER, 1922.

## APPENDIX.

### POSSESSION AND TRANSPORTATION OF LIQUORS ON AMERICAN AND FOREIGN VESSELS.

DEPARTMENT OF JUSTICE,

October 6, 1922.

SIR: Acknowledgment is made of the receipt of your letter of June 23, 1922, in which you inclosed an opinion of the general counsel of the Shipping Board, holding that the Eighteenth Amendment does not apply to American ships on the high seas and stating that in conformity with said opinion liquor is being furnished for beverage purposes on Shipping Board vessels outside the territorial waters of the United States.

You suggest a reconsideration of the rulings of this Department, particularly the opinion of November 1, 1920, relating to the application of the national prohibition act to American ships on the high seas and request advice from this department whether the practice of selling liquors on American ships outside the territorial waters of the United States is permissible under the law.

You further request this Department to advise you whether under our interpretation of the law and the decisions in *Grogan v. Walker* and *Anchor Line v. Aldridge*, cases decided by the United States Supreme Court May 15, 1922, the sale, transportation, or possession of intoxicating liquor for beverage purposes on foreign vessels while in American waters is prohibited.

My answer to the first question is in the negative for the following reasons:

The Eighteenth Amendment To the Constitution of the United States provides:

the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from *the United States and all territory subject to the jurisdiction thereof* for beverage purposes is hereby prohibited.

The fundamental consideration, then, upon which the answer to your first query rests is whether United States ships while on the high seas fall under the legal interpretation of the phrase "the United States and all territory subject to the jurisdiction thereof."

To arrive at the correct legal interpretation of any constitutional provision it is necessary to "read it in the light \* \* \* of the context \* \* \* and the subject with which the amendment dealt and the purpose which it was intended to accomplish \* \* \*." (Chief Justice White, concurring in the *National Prohibition cases*, 253 U. S. 350-390.)

The purpose or intent of the States in adopting the Eighteenth Amendment and that of the legislative body in initiating it must be considered in the light of "the mischief to be prevented" (*Craig v. Missouri*, 4 Pet. 410, 431), the subject, the context, and intention of the body inserting the word in the Constitution (*McCulloch v. Maryland*, 4 Wheat. 316), "all the aids and lights of contemporary history" (*Kendall v. United States ex rel. Stokes*, 12 Pet. 524), "in connection with the known condition of affairs out of which the occasion for its adoption may have arisen \* \* \* in a way, so far as is reasonably possible to forward the known purpose or object for which the amend-



ment was adopted." (*Maxwell v. Dow*, 176 U. S. 581.)

The mischief to be prevented in prohibition enactments has been construed as the use of intoxicating liquor as a beverage. (See *Crane v. Campbell*, 245 U. S. 304.) A glance at contemporary history and the condition of affairs out of which the adoption of the eighteenth amendment arose compels the admission that it represents the culmination of 50 years' struggle of the American people to effectively settle the problems arising from the use of intoxicating liquor as a beverage. Beginning by county, and State by State, the area wherein the manufacture, sale, and possession of intoxicants were made illegal grew until, by the ratification by 45 of the 48 States of the Union, an amendment affirming and extending such prohibition was added to our Federal Constitution. To hold that the intent of Congress in proposing the wording of the amendment, and of the States in ratifying it, was anything less than to extend its inhibitions wherever the judicial arm of this Government extended for any purpose is to fail to apply all the rules the Supreme Court has laid down for arriving at the intent of constitutional enactments.

The term "all territory subject to the jurisdiction thereof" expresses not a limitation just to lands, as the word "territory" might alone be construed, but rather an extension wherever the jurisdiction of the United States may reach.

Certainly Shipping Board vessels operated and owned by our very Government itself are "subject to the jurisdiction thereof." Because of their ownership by the Government they would, in a double sense, be subject to the restrictions of the Eighteenth

Amendment. But every American vessel is for some purposes regarded as a part of American territory and our laws are the rules for its guidance. (*The Scotia*, 14 Wall. 170, 184.)

It is often stated that a ship on the high seas constitutes a part of the territory of the nation whose flag it flies. In the physical sense this phrase obviously is metaphorical. In the legal sense it means that a ship on the high seas is *subject to the exclusive jurisdiction of the nation to which, or to whose citizens, it belongs*. The jurisdiction is quasi territorial. (Moore's International Law Digest, vol. 1, p. 930; *U. S. v. Rodgers*, 150 U. S. 249.)

Our diplomatic correspondence and the opinions of the courts have uniformly considered that in so far as the restraining and protecting jurisdiction of our Government is concerned, American ships, whether owned by the Government or by private citizens or corporations, are in many respects territory of the United States. Some interesting observations in this connection are:

In the case of *United States v. Rodgers* (150 U. S. 249) it is said:

A vessel is deemed part of the territory of the country to which she belongs.

In the case of *Crapo v. Kelley* (16 Wall. 610) the Supreme Court said:

The question then arises, while thus upon the high seas was she in law within the territory of Massachusetts? \* \* \* This (the Constitution) gives the power to the courts of the United States to try those cases in which are involved questions arising out of maritime affairs, and of crimes committed on the high seas.

In *Lindstrom v. International Navigation Company* (117 Fed. 170) the court said:

The *St. Paul* is an American vessel, registered at the port of New York, and when she was on the high seas was a part of the territory of the State of New York, hence all civil rights of action for matters occurring aboard of her at sea are determined by the laws of that State. (*McDonald v. Mallory*, 77 N. Y. 546, 33 American Reports 664; *The Lamington* (D. C.) 87 Fed. 752; *St. Clair v. United States*, 154 U. S. 152, 38 L. Ed. 936.)

Mr. Blaine, Secretary of State, in a letter to Mr. Ryan, Minister to Mexico, November 27, 1889 (set forth in Moore's Law Digest, vol. 1, p. 931), says:

Merchant vessels *on the high seas*, being constructively considered as for most purposes a part of the territory of the nation to which they belong, they are not subject to the criminal laws and processes of another nation.

Mr. Webster, as Secretary of State, spoke for this Government in his letter to Lord Ashburton, August, 1842, as follows:

It is natural to consider the vessels of a nation as part of its territory though at sea, as the State retains its jurisdiction over them and according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. \* \* \* It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the

place \* \* \* but, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself. (Webster's Works, vol. 6, pp. 306, 307.)

This case was cited with approval by the United States Supreme Court in the case of *United States v. Rodgers* (*supra*).

In the case of *St. Clair v. United States*, 154 U. S. 134, 152, the court held:

A vessel registered as a vessel of the United States, is, in many respects, considered as a portion of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs.

Ships are "territory" in a constructive rather than an actual sense. This distinction is clearly shown by Justice Field in *United States v. Smiley* (6 Sawyer, 640, 645):

The criminal jurisdiction of the Government of the United States is limited to their own territory, actual or constructive \* \* \* Their constructive territory embraces vessels sailing under their flag. Wherever they go they carry the laws of their country, and for a violation of them their officers and seamen may be subjected to punishment.

Great stress is laid on the argument that the word "territory" in the Eighteenth Amendment must be construed the same as it was in its use in Article IV, section 3, of the Constitution, and the case of *United States v. Gratiot* (14 Pet. 526), is cited to show a construction synonymous with the word "lands." But that the same construction must be given the same word when used in an entirely different context does not follow. (*Cherokee Nation v. Georgia*, 5 Pet. 1.) Furthermore, the definition of the word "territory" in the Gratiot case (*supra*) is specifically restricted in its application to the use in Article IV, since the Supreme Court says they interpret the word "territory" only "as here used." It there referred undoubtedly only to lands, because Article IV, section 3, was placed in the Constitution to give the Federal Government authority over the western territory claimed by States under their conflicting sea-to-sea grants. (See Debates in the Constitutional Convention and Watson on the Constitution, vol. 21, p. 1255.)

The construction of the word "territory" in the fourth article of the Constitution to mean lands is in complete harmony with the intent of the framers of that article of the Constitution. I believe from the study of the history of conditions out of which the Eighteenth Amendment grew, it is equally clear that the words "territory subject to the jurisdiction" of the United States carry the intent to extend its provisions over every spot where the flag of America flies.

This intent is a living part of the Eighteenth Amendment and the National Prohibition Act, for, as Justice Brown has said in *Hawaii v. Mankichi* (190 U. S. 197, 212):

Without going back to the famous case of the drawing of blood in the streets of Bologna,

the books are full of authorities to the effect that the intention of the law-making power will prevail, even against the letter of the statute, or, as tersely expressed by Mr. Justice Swayne in *Smythe v. Fiske* (23 Wall. 374, 380): "A thing may be within the letter of a statute and not within its meaning, *and within its meaning*, though not within its letter. *The intention of the lawmaker is the law.*" A parallel expression is found in the opinion of Mr. Chief Justice Thompson of the Supreme Court of the State of New York, (subsequently Mr. Justice Thompson of this court,) in *People v. Utica Ins. Co.* (15 Johns, 358, 381): "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers."

It is urged that Acts passed under article 1, section 8, clause 10, of the Constitution, all carry the express provision that they shall apply on the high seas, whereas the National Prohibition Act does not contain such plain extension. But the difference between the two provisions of the Constitution, by authority of which the laws emanate, is material. Article 1, section 8, clause 10, *gives Congress power* to define and punish piracies and felonies committed on the high seas, which offenses by their nature had formerly remained solely in the power of the States to handle. Article 1 of the Constitution prohibited nothing, nor did it define an offense. Of course, therefore, it was necessary for the Act of Congress to define the offense, provide for its punishment, and make provision as to its jurisdiction, since all the regulatory power lay in the congressional enactment, *not* in the constitutional provision. The Eighteenth

Amendment is quite different. It is really a law itself, as well as a declaration of an organic constitutional principle. From its terms alone flows the real prohibition. Palpably, therefore, since by the force of the amendment prohibition is carried everywhere within the confines of the sovereignty of the United States, the National Prohibition Act, passed to facilitate its enforcement and punish its violation, would be coextensive therewith.

The Thirteenth Amendment is similar. It, too, names a new prohibition and states the extent of its application. Enactments resulting from it do not carry specific provision for their application to offenses committed on the high seas, and yet no one would advance the theory that because of that fact slavery might be permitted on American ships while on the high seas. (See sec. 268, Penal Code, also the peonage sections 269, 270, 271 P. C.).

Concerning the self-executing effect of the provisions of the Thirteenth Amendment, the observation of Mr. Justice Bradley in the *Civil Rights cases* (109 U. S. 3, 20) is interesting in the light of its applicability also to the effect of the Eighteenth Amendment.

This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit.

Another illustration of the application of a provision of the Constitution and laws passed pursuant to

it to the high seas, even though there is no specific reference to the high seas, is found in Article III, section 3, clause 1, of the Constitution, defining treason. It does not indicate the territorial scope of its application, nor do the Acts of Congress passed to enforce it, but in *United States v. Greathouse* (4 Savoy, 457) it was held that the purchase and fitting up of a vessel with arms in furtherance of a design to commit hostilities on the high seas constituted treason. (See also *Hawaii v. Mankichi*, 190 U. S. 198.)

Section 37 of the Penal Code and other general statutes of the United States, having by their terms no specific extension to the high seas, have been held to extend to violations committed on American vessels outside of American waters.

The same rule has been applied in cases of extradition; for instance, where the treaty has provided that persons will be surrendered who commit crimes within the jurisdiction of the demanding country, the word "jurisdiction" has been held to cover vessels on the high seas. (Moore on Extradition, vol. 1, p. 135, sec. 104 Vogt., 14 Op. 281; Wharton's State Trials, pp. 392, 403, 404; Seale's Cases on Conflict of Laws, sec. 22, p. 506.)

Vessels are taxable as personal property at their home port, although they are actually on the high seas, and have never in fact come within the jurisdiction of the home port. (*People v. Commissioner of Taxes*, 58 N. Y. 242; *Olson v. San Francisco*, 82 Pac. 850.) Similarly, the pilotage laws (*Wilson v. McNamee*, 102 U. S. 572, 574) and the laws concerning assignment (*Crapo v. Kelly*, 16 Wall. 610) have such extended operation. It is a recognized principle of law that the State has general civil jurisdiction over



vessels registered at her ports, even where the cause of action arises on the high seas. (*Wilson v. McNamee*, 102 U. S. 572; *Manchester v. Comm. of Mass.*, 139 U. S. 240; *Crapo v. Kelly* (*supra*); *Old Dominion Steamship Company v. Gilmore*, 206 U. S. 402, 403.) In the *Old Dominion Steamship Company* case Mr. Justice Holmes in delivering the opinion of the court said:

In short, the bare fact of the parties being outside the territory, in a place belonging to no other sovereign, would not limit the authority of the State, as accepted by civilized theory. No one doubts the power of England or France to govern their own ships upon the high seas.

The oceans, outside the territorial waters of nations have long been regarded as the highway of all, wherein all nations share the privileges of tenants in common. If, then, the United States shares the high seas as a tenant in common with other nations of the world, the eighteenth amendment would be broad enough to comprehend the sea as territory of the United States in so far as, and where, and when, it is used by American bottoms.

In an early English case, the *King against Brizac and Scott* (4 Easts Term Reports, 164), it is held that "an information for conspiracy \* \* \* for planning and fabricating false vouchers to cheat the Crown, which planning and fabricating were done on the high seas, is well triable in Middlesex." (Quoting from the headnote.)

In *Corpus Juris*, Vol. XVI, under the heading "Criminal Law," page 169, paragraph 216, it is said:

In the absence of a statute, the courts of a country have not jurisdiction of an offense committed on the high seas except in the case

of piracy, *unless the offense is committed on board a ship belonging to that country.* (Italics ours.)

An examination of the National Prohibition Act by itself leads to the conclusion that its operation is extended to American vessels on the high seas, since its terms are absolutely general and have no limits of any sort. The only objection is that crimes on the high seas are all dealt with in chapters 11 and 12 of the Criminal Code, but the peculiar language of the relevant section, 272, Penal Code, is significant. All it says is that the crimes and offenses named in the chapter shall be punished when committed on the high seas. It then lists certain ordinary common-law offenses, such as murder, over which of course the Federal Government would not ordinarily by virtue of its limited powers have any jurisdiction whatsoever. There is no intimation in section 272 that no other crimes and offenses except those defined in chapter 11 shall be punished when committed on American vessels on the high seas, and especially is there no suggestion that offenses which violate the avowed constitutional policy of the Federal Government itself shall be so exempted from punishment. On the contrary, the grant in section two of the Eighteenth Amendment of concurrent power to the States and to the Federal Government to enforce the provisions of section 1 thereof would justify the reasonable conclusion that the Federal enactment passed pursuant thereto reached to the jurisdictional limits of other Federal laws. The provisions of the Criminal Code generally apply to the same territory over which the Judicial Code gives jurisdiction to the United States courts, and section 41 of the Judicial Code provides:

The trial of all offenses committed upon the high seas \* \* \* shall be in the district

where the offender is found, or into which he is first brought. (See *Pederson et al. v. United States*, 271 Fed. 187.)

The Shipping Board has frequently sought to punish offenses committed against its property on the high seas by maintaining the applicability of general criminal statutes, such as section 37 and section 35 of the Penal Code of the United States, to crimes committed on the high seas. (See *United States v. Hawkins*, So. Dist. of N. Y.; also *United States v. Bowman et al.*, now pending in the Supreme Court of the United States, Docket No. 69.) It would be inconsistent for American vessels to enjoy the protection of laws of general jurisdiction and fail to be governed by the prohibitions of one of similar jurisdiction.

In the case of *United States v. 254 Bottles of Intoxicating Liquors* (Southern District of Texas, May 4, 1922) the court announces that "the sole question for decision is, Had the master the right to possession of the goods on board ship (of United States) on the high seas and was this possession in violation of the National Prohibition Act?" And then holds that such possession was a violation of the law, for which the stores were forfeitable and the owner liable to punishment.

The case of *Scharrenberg v. Dollar Steamship Company* (245 U. S. 122) is greatly relied upon by shipping interests as authority that an American ship is not in any sense a part of the territory of the United States. It was a case based on an alleged violation of an act of Congress by which it was a misdemeanor to assist contract laborers *into the United States*.

A contract laborer was defined as one who comes to perform labor *in this country*. Clearly, the phrases

"into the United States" and "into this country" are narrower in extent than "the United States and all territory subject to the jurisdiction thereof." Had the Eighteenth Amendment stopped after prohibiting the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from *the United States*, the cases would be similar, but the Eighteenth Amendment goes further and says "and all territory subject to the jurisdiction thereof." We are led inevitably, therefore, to the conclusion that after the prohibition in *the United States* (which to that point is analogous to the statute considered in the Dollar Steamship Company case) the phrase "and all territory subject to the jurisdiction thereof" was added to extend the scope of the amendment to the very limits of national jurisdiction and sovereignty.

My answer to your second question is in the affirmative.

It is a long-established principle of municipal and international law that a nation has the right to make and enforce laws covering its territorial waters as well as its land. In *United States v. Diekelman* (92 U. S. 520, 525), Mr. Chief Justice Waite states:

The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain. (See also Moore's International Law Digest, Vol. II, 275, et seq.)

In 1885, Mr. Bayard, Secretary of State, wrote to the French Minister as follows:

A foreign merchant vessel going into the port of a foreign State subjects herself to the laws of that State and is bound to conform to its commercial as well as to its police and other

regulations during the period of her stay there. "She is as much a *subditus temporaneus*," remarks Sir R. Phillimore with reference to such a case, in *The Queen v. Keyn* (2 Ex. D. 82), "as the individual who visits the interior of the country for the purposes of pleasure or business." (Moore's International Law Digest, Vol. II, p. 308.)

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange* (7 Cranch, 116, 144), "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such \* \* \* merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." (*United States v. Diekelman*, 92 U. S. 520; 1 Phillimore's Int. Law, 3d ed. 483, sec. 351; Twiss Law of Nations in Time of Peace, 229, sec. 159; Creasy's Int. Law, 167, sec. 176; Halleck's Int. Law, 1st ed. 171.) And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. (*Regina v. Cunningham*, Bell C. C. 72; S. C. 8 Cox C. C. 104; *Regina v. Anderson*, 11 Cox C. C. 198, 204; S. C. L. R. 1 C. C. 161, 165; *Regina v. Keyn*, 13 Cox C. C. 403, 486, 525; S. C. 2 Ex. Div. 63, 161, 213.) As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes

that government such allegiance for the time being as is due for the protection to which he becomes entitled. (*Wildenhus's Case*, 120 U. S. 11, 12.)

If then the bringing in of liquors by foreign vessels as ship stores or otherwise constitutes a transportation or possession contrary to the eighteenth amendment and the national prohibition act, it is clearly a violation of the law that no executive or administrative officer of the Government has the power to permit.

The Constitution prohibits transportation which has been defined as "the taking up persons or property at some point and putting them down at another." (*Gloucester Ferry Company v. Comm. of Pa.*, 114 U. S. 196, 203.) That the innocence of any intent to "put them down" or use them in the United States is not material in determining whether the transportation is a violation of the law is determined by the *Walker* and *Anchor Line* cases (*supra*), where the court decided that intoxicating liquor stored on one British ship could not lawfully be removed to another British ship in the New York Harbor, although it was admittedly destined for beverage uses outside the United States.

Furthermore, the National Prohibition Act prohibits possession as well as transportation of intoxicants for beverage purposes, irrespective of where they are to be put to such beverage use. Under the reasoning of the court in the *Walker* and *Anchor Line* cases (*supra*), it is no argument for the legality of foreign ships possessing and transporting intoxicating liquors in and across our waters, that they do not intend to use the liquors until after leaving the jurisdiction of the United States, for the court said in that connection:

The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country \* \* \*. It is obvious that those whose wishes and opinions were embodied in the amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in, some of it was likely to stay. When, therefore, the amendment forbids not only importation into and exportation from the United States but transportation within it, the natural meaning of the words expresses an altogether probably intent. The prohibition act only fortifies in this respect the interpretation of the amendment itself. The manufacture, possession, sale, and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. (Title III, sec. 20; 41 Stat. 322.)

Are we then to argue that such inflexible provisions of law, declared by our Supreme Court as the constitutional policy of our country, shall apply to our own citizens, but be abandoned when we deal with ships of a foreign nation? To do so would be a grievous surrender of our sovereignty. And it is outside the province of an executive or administrative officer of the Government to read into the law and the Constitution an exception not specifi-

cally contained therein. Particularly should it be avoided when the results of granting the privilege to foreign ships would be to produce manifestly unfair conditions of competition for our own citizens and shipping interests. Chief Justice Marshall puts the situation clearly in "*The Exchange*" (7 Cranch 135, 143):

The jurisdiction of the Nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation not imposed by itself. \* \* \* When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption.

Again in *The Eagle* (18 Wallace, 15, 22) the Supreme Court holds that—

All vessels entering into, or departing from, a domestic or foreign port are bound to obey



the laws and well-known usages of the port, and are subject to seizure and penalties for disobedience; and when submitting to them, they are entitled to all the protection which they afford.

The court carefully considered this whole question in the *Walker* and *Anchor Line* cases and went so far as to hold that the Eighteenth Amendment and the National Prohibition Act repealed a prior existing treaty with Great Britain.

Prior to the sweeping and comprehensive construction placed upon the prohibition law in those cases, it might possibly have been arguable whether liquors forming a part of the ship stores on vessels within territorial waters might be regarded as an implied exception to the National Prohibition Act. Whatever doubts that may have previously existed, have been swept away by the language of the majority opinion in those cases. It is true that this decision was rendered by a divided court, but the dissenting opinion clearly sets forth the arguments that must have been carefully weighed before the majority opinion was rendered. It included a consideration of such arguments as "this country does not undertake to regulate the habits of people elsewhere" and "it has no interest in meddling with transportation across its territory if leakage in transit is prevented." But the very vigor of the dissenting opinion, in which three judges joined, simply emphasized the sweeping character of the majority opinion by which I feel I am bound in deciding this question.

I am, therefore, of the opinion that the Eighteenth Amendment and the National Prohibition Act prohibit as unlawful the possession and transportation of beverage liquors on board foreign vessels while in our

territorial waters, whether such liquors are sealed or open.

By way of summary, therefore, I am of the opinion that under the rules of fair intendment American ships wherever they may be are included in the terms of the Eighteenth Amendment, "territory subject to the jurisdiction" of the United States, so that manufacture, transportation, or sale of intoxicating liquors for beverage purposes is prohibited thereon. To construe otherwise would, in my opinion, violate the unmistakable intent in its adoption, such intent clearly adduced from a study of the circumstances out of which it grew, and voiced by the Supreme Court in the *Walker* and *Anchor Line* cases.

This interpretation is further supported by the many authorities that have held ships to be "constructive territory" of the country whose flag they fly. Such decisions undoubtedly extend the protection as well as the inhibitions of the country's laws.

The National Prohibition Act is an act of general jurisdiction in force wherever the Eighteenth Amendment applies; and the courts of the United States have jurisdiction to punish its violations on the high seas.

I am forced to the opinion, under the ruling of the *Walker* and *Anchor Line* decisions (*supra*), that foreign ships carrying intoxicating beverage liquors as ship stores or otherwise, within the 3-mile limit of our shores, are violating the provisions of the National Prohibition Act, prohibiting possession or transportation of intoxicating liquor for beverage purposes. The Supreme Court therein has held that it is not material that the liquors may not be intended for beverage uses within the United States, because the court emphasized that the Eighteenth Amendment marks a revo-

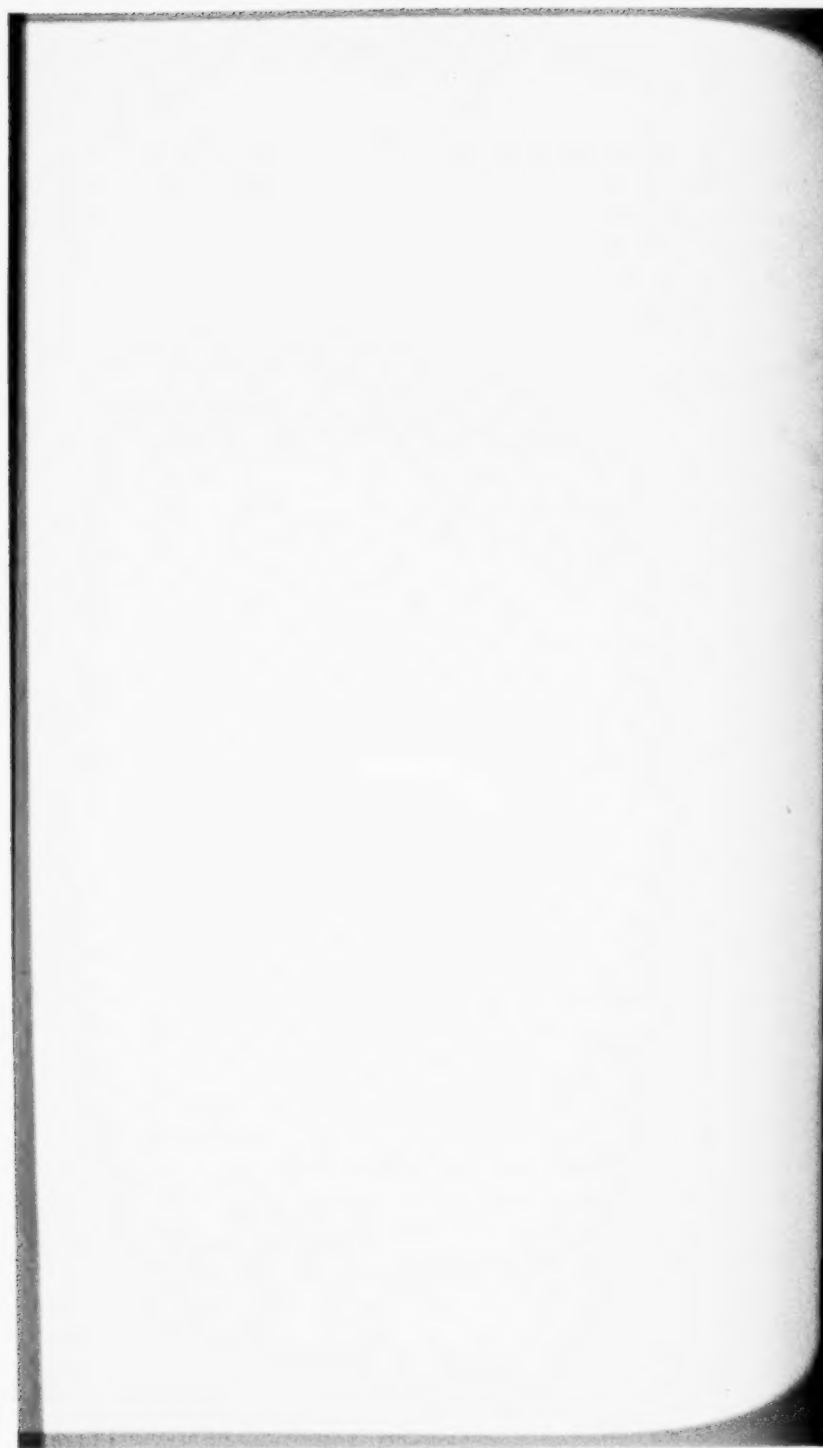
lution in our former national policy toward intoxicating liquor and does not confine its prohibition in any meticulous way within the United States, but on the contrary its intent was as far as possible to "stop the whole business."

Respectfully,

HARRY M. DAUGHERTY.

To the SECRETARY OF THE TREASURY.

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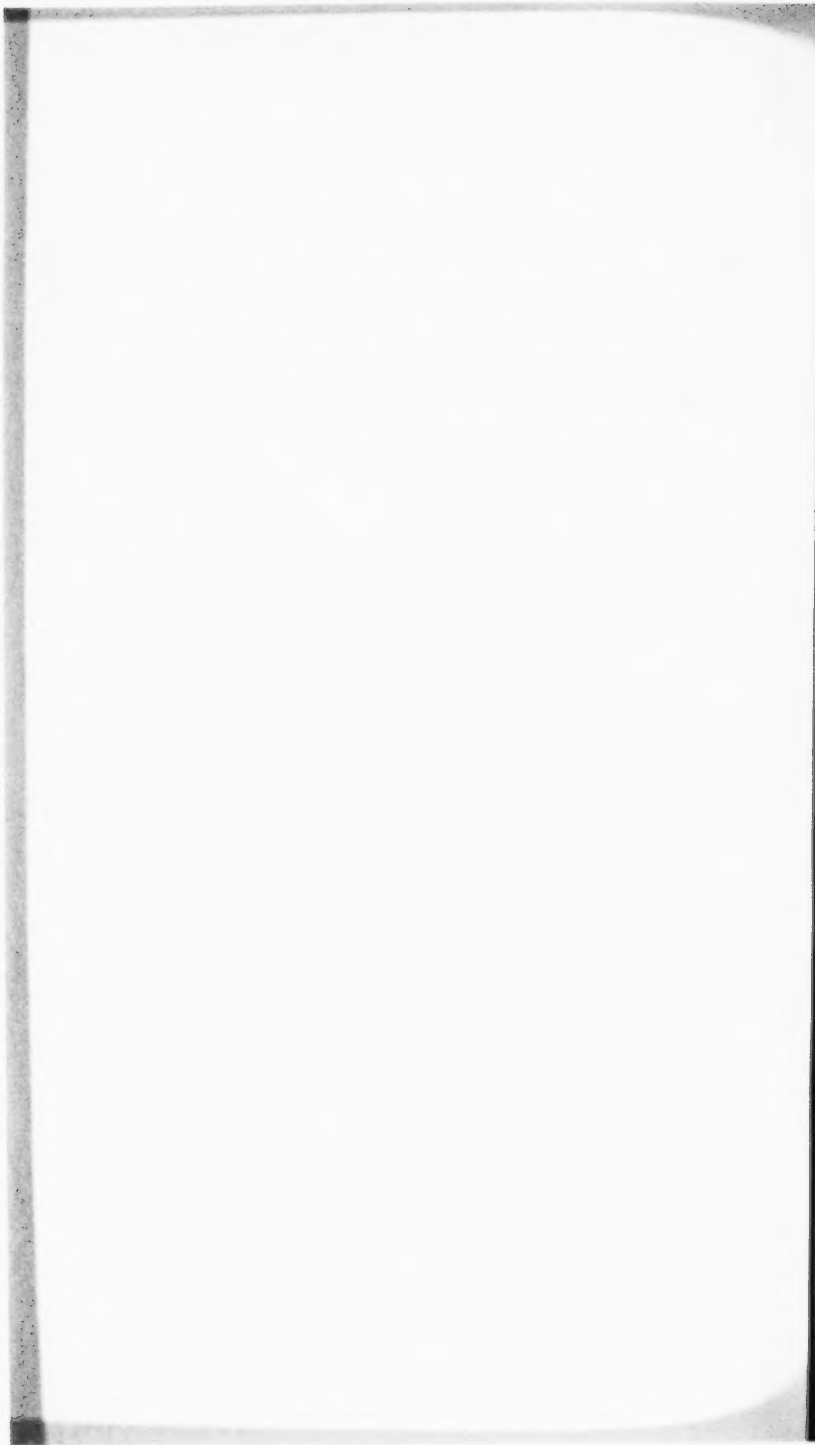
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SUPREME COURT OF THE UNITED STATES.

INTERNATIONAL MERCANTILE MARINE  
COMPANY,

*Appellant.*

*against*

H. C. STUART, Acting Collector of Customs for the Port of New York,  
RALPH A. DAY, Federal Prohibition Director for the State of New York,  
JOHN D. APPLEBY, Chief Zone Officer, and WILLIAM HAYWARD, United States Attorney for the Southern District of New York,

*Respondents.*

October Term,  
1922.

No. 693.

BRIEF ON BEHALF OF APPELLANT.

This case comes before the Court on a direct appeal taken by the complainant below under Section 238 of the Judicial Code, from a decision and decree of the Honorable Learned Hand in the United States District Court for the Southern District of New York in which he dismissed a bill in equity involving the construction of the Eighteenth Amendment of the Constitution of the United States, its applicability to vessels of the United States

and the constitutionality of the National Prohibition Act as applied to such vessels.

The bill was brought by the International Mercantile Marine Company, as owner of the American steamships *St. Paul*, *Finland* and *Kroonland*,—which were all registered as vessels of the United States under Revised Statutes 4131-4132, and engaged in passenger trade between ports of the United States and foreign ports, principally in Belgium—to secure a permanent injunction preventing the threatened enforcement against the complainant and its vessels by the defendants, their agents, servants, subordinates and employees of the penalties of the National Prohibition Act. *Bill of Complaint*, pp. 1-7.

The bill prayed that the defendant should be restrained,

A. From interfering in any manner whatsoever—

1. With the arrival or departure of the complainant's vessels with intoxicating liquor on board, sealed as sea stores.

2. With the peaceful possession of intoxicating liquors on board complainant's vessels as part of their sea stores.

B. From inflicting any seizures, forfeitures or penalties against the complainant or its vessels by reason of any alleged violation of the National Prohibition Act, based on the ground—

1. That the ships of the complainant have intoxicating liquors on board, sealed as sea stores while in the ports of the United States, or

2. That there have been sales of liquor, carried as sea stores, made on the high seas or in foreign ports on complainant's vessels.

There was also the usual general prayer for such relief as the complainant may justly be entitled to receive. *Record*, pp. 6-7.

Copies of the Treasury decisions construing the Act so far as sea stores were concerned and exempting them from its operation were annexed to the bill of complaint. *Record*, pp. 8-9.

The relief sought in the bill was broad enough to leave vessels of the United States free to deal with the question of intoxicating liquors in the same manner as they had been expressly authorized to deal with such liquors, since the enactment of the National Prohibition Act, by the construction which had theretofore been put on said Act by the Government.

A temporary restraining order was granted with an order to show cause returnable October 14, 1922, why a permanent injunction should not be granted. *Record*, pp. 10-11.

A general appearance and answer were filed by the defendants, which took issue with the complaint on the principal ground that the threatened actions of the de-

fendants would not interfere with the complainant's constitutional rights. *Record*, pp. 15, 17-18.

An additional affidavit by Mr. John H. Thomas was filed before the hearing in pursuance of the leave given in Section 2 of the order to show cause. *Record*, pp. 10, 12.

Mr. Thomas' affidavit, showed that under Belgian Government Regulations twenty bottles of claret for every 100 emigrants was required, and that under the British Board of Trade Regulations, one gallon of brandy for every 100 passengers was required on foreign flag steamers clearing from British ports with British passengers on board. *Record*, p. 16.

The case came on to be heard at the same time as similar bills of complaint brought by various foreign steamship companies.

Judge Hand ruled in his first opinion that as a question of practice the allegations of the bill of complaint in this case with regard to threatened prosecutions for sale on the high seas and in foreign ports were not strong enough properly to raise the question as to the right of American vessels to have on board and sell liquor on the high seas. *Record*, p. 30.

As it was intended by both parties to raise this question, the bill of complaint was accordingly amended by stipulation. *Record*, p. 19.

Thereupon Judge Hand rendered a second opinion in which he dealt with the question raised by the amendment in the bill of complaint, and in the two opinions he ruled on the whole question of the applicability of the Eighteenth Amendment and the National Prohibition

Act to vessels of the United States on the high seas and in foreign and domestic waters.

In Judge Hand's first opinion, rendered October 23, 1922, he dealt with the question of carriage of liquor as sea stores within the territorial waters of the United States both by foreign vessels and vessels of the United States.

He held that, although sea stores were commonly treated as part of a vessel, and although vessels were not mentioned in the Amendment or the National Prohibition Act, they were covered by the literal meaning of the Amendment and the Act; and that, in view of the broad purpose of reform involved in the Amendment and its enforcing legislation, there should not be any implication of an exception of vessels or sea stores because the implication of an exception from a statute which literally covers a situation depends on the circumstances involved and the purpose of the legislation. In this case he held the legislation was intended to be all inclusive. *Record*, pp. 27-32.

Therefore he held that sea stores of liquor kept on board vessels whilst moving within the territorial waters of the United States were being transported contrary to the prohibitions of the Amendment and the National Prohibition Act. *Record*, pp. 26-27.

After this first decision had been rendered and the amendment of the bill of complaint above referred to had been made, there still remained the question to be decided as to whether the Eighteenth Amendment and the National Prohibition Act applied to vessels of the United States on the high seas and within foreign ports.

Judge Hand rendered his opinion on this point on October 26, 1922, and held that the provisions of the Eighteenth Amendment, prohibiting the sale of intoxicating liquors for beverage purposes within "the United States and all territory subject to the jurisdiction thereof," involved a prohibition by the Constitution of the sale of liquor on American ships on the high seas and in foreign ports on the ground that ships are treated metaphorically for most purposes by our municipal law and by international law as part of the territory of the country whose flag they fly. *Record*, pp. 20-24.

In pursuance of these opinions, Judge Hand made a final decree dismissing the amended bill of complaint, and, at the same time, he made certain provisions for staying prosecution of the complainant in respect of intoxicating beverages kept on board as sea stores under the requirements of the foreign laws above mentioned. *Record*, p. 33.

An immediate appeal was taken, *Record* p. 34, and errors assigned which raise the question of the construction of the Eighteenth Amendment and the application of that Amendment and of the National Prohibition Act to vessels of the United States while in our territorial waters, on the high seas and in foreign ports. *Record*, pp. 34-36.

On November 13, 1922, the complainant made a motion before this Court to advance the case. This motion was granted on November 20th, and the case was assigned by this Court for argument on Tuesday, January 2, 1923.

## FIRST POINT.

THE DISTRICT JUDGE ERRED IN HOLDING THAT INTOXICATING LIQUORS WHICH HAVE BEEN LEGALLY ACQUIRED AND WHICH ARE KEPT ON AND USED ONLY AS SEA STORES BY VESSELS OF THE UNITED STATES ARE WITHIN THE PURVIEW OF THE EIGHTEENTH AMENDMENT.

1. *Sea stores are consumable provisions kept on board a vessel as part of her equipment for the maintenance of her passengers and crew.*

The nature of sea stores has been the subject of decision under general maritime law in England, of legislation by Congress and of both Court and Departmental decisions in the United States.

Sea stores have always been recognized as an inherent and essential part of the vessel on which they were kept and as falling within the definition above given to them.

### A. *General Maritime Law and Practice.*

In *Brough v. Whitmore*, 4 Term Reports 206 (1791), it was held that provisions sent out in a ship for the use of her crew were protected by a policy of insurance on the ship and furniture.

It appeared that whilst the ship was lying in the River Canton, it became necessary to refit her, for which purpose the stores and provisions were taken out and put into a warehouse. Whilst in the warehouse, the stores were destroyed by accidental fire.

It was admitted by the insurers that the policy covered all the articles except the provisions for the use of



the ship's crew and the point was that if these provisions were not protected by the policy there was not an average loss of £3 per cent. and hence the policy was not opened up for a recovery.

Thus the flat question came up to be decided whether sea stores were a part of the vessel and her furniture or not. The plaintiffs obtained a verdict and a rule to show cause why a new trial should not be granted was entered.

This rule came on to be heard before Lord Chief Justice Kenyon, Mr. Justice Ashurst, Mr. Justice Buller and Mr. Justice Grose, and it was held unanimously that provisions were part of the ship.

Mr. Justice Buller said, 4 Term Reports, at page 210 (*Italics ours*):

“\* \* \* Now it is perfectly clear that in every instance where losses have been settled, *the provisions put on board the vessel when she sailed have been considered as part of the ship. The value is taken in this way; the underwriters have a right to go and see the ship, to examine the value of the hull, the masts, and the provisions; the value of the ship alone comprehends all these articles:*  
\* \* \*”

Accordingly the rule for a new trial was unanimously discharged.

In the case of *The Dundee*, 1 Hagg. Adm. 109 (1823), Lord Stowell had to decide whether fishing stores of a vessel engaged in the Greenland Fisheries were appurtenances of the ship within the meaning of 53 George III, c. 159, which restricted the liability of a shipowner in case of loss to the value of the ship, her tackle, apparel, furniture, freight and appurtenances.

At page 126, Lord Stowell said (*Italics ours*):

“It may not be a simple matter to define what is, and what is not, an appurtenance of a ship. There are some things that are *universally so*—things which must be appurtenant to every ship, *qua ship*, be its occupation what it may. *But, I think, it is rather gratuitously assumed that particular things may not become so from their immediate and indispensable connection with a ship, in the particular occupation to which she is destined, and in which she is engaged. A ship may have a particular employment assigned to her, which may give a specialty to the apparatus that is necessary for that employment.* \* \* \* The word ‘appurtenances’ must not be construed with a mere reference to the abstract naked idea of a ship; for that which would be an incumbrance to a ship one way employed, would be an indispensable equipment in another, and it would be a preposterous abuse to consider them alike in such different positions. *You must look to the relation they bear to the actual service of the vessel.* \* \* \*.”

Accordingly he held that the value of the stores must be included in the limitation fund, and application was made to the King’s Bench for a prohibition declaration.

The decision was approved in the Court of King’s Bench *sub nomine Gale v. Laurie*, 5 B. & C. 156 (1826), where it came up on the declaration in prohibition.

Lord Chief Justice Abbott, afterwards Lord Tenterden, who was the author of the first great modern book on shipping law—Abbott’s *Law of Merchant Shipping*,—said, 5 B. & C., at page 164 (*Italics ours*):

“\* \* \* *The fishing stores were not carried on board the ship as merchandise but for the accomplishment of the objects of the voyage; and we think, that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances within the meaning of this Act, whether the object be warfare, the conveyance of passengers or goods, or the fishery.*

“This construction furnishes a plain and intelligible general rule; whereas, if it should be held that nothing is to be considered as part of the ship that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions, and much discussion and cavil.”

In the English Marine Insurance Act of 1906, which is a codification of the maritime law and practice on the matter of marine insurance, the insurable value of the ship is thus stated in Section 16 of the Act, which can be found as Appendix A at page 1659, Volume II, of the Tenth Edition of Arnould on *Marine Insurance*.

Section 16 of the Act reads as follows (Italics ours):

“\* \* \*

“(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, *provisions and stores for the officers and crew*, money advanced for seamen’s wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole:

“The insurable value, in the case of a steamship, includes also the machinery, boilers, and

coals and engine stores if owned by the assured, *and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade:*"

A further proof of the incorporation of sea stores into the ship as an essential part of her is the fact that they are valued by surveyors when valuing the ship for general average contribution as part of the contributory value of the ship.

In Lowndes on *General Average*, which is one of the best known of all books on General Average, the following rule is laid down in Section 76, page 375, fifth edition (Italics ours) :

"The ship, the cargo, and the freight, constitute, generally speaking, the whole of the property on shipboard liable to contribute to general average. Should there be any kind of property, not coming under any of these heads, which is preserved from destruction by a general average act, this likewise must contribute, unless there be some special reason for exempting it. \* \* \* Everything which is covered by an ordinary policy of insurance on the ship, *that is to say, her appurtenances of every kind, including the provisions laid in for the voyage and unconsumed at the end of it, is brought into contribution as included in the value of the ship.* If there be anything else on shipboard, not constituting merchandise in the proper sense of the word, yet possessing a substantial value, it ought to contribute. *For example, the unconsumed stores of a troop ship, or those laid in by a passenger charterer; planks or*

other materials used as dunnage, or covering-boards, or for the construction of temporary bulkheads for cargo, or the like, should properly be brought in as contributing. It is only the small value of such articles which occasions their being, in practice, frequently disregarded."

It is also a very interesting fact that in the case of many European nations a separate list of ship's stores is considered as part of the ship's papers in addition to the ordinary cargo manifest. Atherly Jones on *Commerce in War*, pages 347-352.

#### B. *Statutes passed by Congress.*

Under the general requirements as to the manifest which must be made by masters of vessels coming into the United States, with merchandise from any foreign port, there was a provision that there must be made "An account of the sea stores remaining, if any." *Revised Statutes*, Sec. 2807, as amended by the Act of June 3, 1892.

In *Revised Statutes*, Sec. 2775, enacted first on March 2, 1799, and later amended May 1, 1872, there is a provision requiring a special report of spirits and wines on board vessels coming into our ports. This Statute, after providing for a special report as to spirits and wines on board as cargo, proceeds to provide that the master should report also the quantity and kinds of spirits and wines on board such vessel as sea stores.

In the Act of March 2, 1799, Chapter 22, Section 45, *Revised Statutes* 2795, there is a provision that the mas-

ter shall specify his sea stores when he comes into port. The purpose of this provision was that the precise nature and extent of such provisions may be known and their immunities established.

The Tariff Act of 1922 repealed all the sections above referred to regarding the manifesting of ship stores, sea stores, and merchandise, *Tariff Act of 1922*, Section 641, and re-enacted new provisions for the manifesting of sea stores which, although they did not specifically mention liquor as sea stores, did not exclude it. *Tariff Act of 1922*, Sections 431 and 432.

It is significant that in Section 584, there is a specific provision for punishment of the master and a lien on the vessel in the event that opium prepared for smoking which has not been manifested is found on board; but that there is not among the administrative provisions of the Tariff Act of 1922, any mention of intoxicating liquors or any provision excluding such liquors as improper sea stores.

There is not in the debates of Congress leading up to the enactment of the Tariff Act of 1922 any mention of any intention to exclude liquor from sea stores of vessels. The object of the amendment was apparently merely to recodify and simplify the law as to manifests.

### *C. Court Decisions in the United States.*

The question of sea stores and their relation to the manifest under the early Statutes above-mentioned, was discussed by Mr. Justice Baldwin, sitting on Circuit, in the case of *United States vs. Twenty-four Coils of Cordage*, 28 Fed. Cas. 276; *Baldwin*, 502 (1832).

Mr. Justice Baldwin said on page 279:

“\* \* \* It directs a manifest of the cargo to be made out, together with the name or names of the passengers, distinguishing whether cabin or steerage passengers, or both; their baggage and packages belonging to each, together with an account of the remaining sea stores, if any.’ To the question, what are such sea stores? a plain answer is furnished; such articles of provision and stores, as were put on board by the captain or passengers, and not consumed on the voyage, but remaining on hand at its termination. The words ‘vessel and cabin stores’ in the form of the manifest are not inserted for the purpose of introducing any distinct class or kind of sea stores, but merely as the head under which those designated in the preceding part of the section should be entered on the manifest, as the ‘remaining sea stores.’ These views of the law are very fully apparent in the thirtieth section, prescribing the form and requisites of the oath of the master to the manifest. ‘And I do further swear, that the several articles specified in the said manifest as the sea stores for the cabin and vessel, are truly such, and were bona fide put on board for the use of the officers, crew and passengers thereof; and are intended to remain on board, for the consumption of said officers and crew.’ If the ship has on board wines, spirits or teas, the captain is, by the same section, required to report the quantity and kind on board, as sea stores, to enter them in the manifest under that head, and to superadd his oath, as in the case of other sea stores on board.”

In the case of *United States vs. One Hempen Cable and One Hempen Hawser*, 27 Fed. Cas. 264 (1831), Judge

Davis, in the District of Massachusetts, in construing the Customs Laws, spoke of sea stores as follows, at page 265:

“\* \* \* ‘Vessel and cabin stores’, is the expression in the 23d section of the collection law; in the 45th Section, it is ‘sea stores of a ship or vessel.’ These expressions are understood to mean, and naturally do mean, the stores or provisions laid in for cabin or steerage, for officers, passengers or crews, or if further extended, can only be applicable to articles of consumption, perishing in the using, and not to the tackle and apparel of the ship, and sails, rigging, cables or anchors. These are to be considered as attached to the ship, and so belonging to the ship that it is no more necessary to include them in the manifest than the ship itself.”

It was held in *United States vs. Hawley & Letzerich*, 160 Fed. 734, that coal was not sea stores and the following definition of sea stores was given by Judge Burns in reviewing a decision of the Board of General Appraisers, at page 739:

“The sole question for review as disclosed by the pleadings and relied upon in the argument is whether or not ‘coal’ is a part of the sea stores of the vessel. ‘Sea stores’ are defined in Commercial Navigation as ‘the supplies of different articles provided for the subsistence and accommodation of the ship’s crew and passengers.’

“It follows, therefore, that coal being no part of the vessel’s sea stores, the petition for review should be sustained, the decision of the board reversed, and the action of the collector of customs in all things affirmed.”



In fact liquors are "necessaries" for a vessel in the ocean passenger trade.

The question whether liquors were necessities for a vessel after having been decided both ways, came up before Judge Dodge in the District Court of Massachusetts in the case of *The Satellite*, 188 Fed. 717 (1910). He discussed the opposing decisions and came to the conclusion that in the case before him liquors were necessities and that in each case whether they were necessities or not was to be determined by the character of the employment of the vessel. He said at page 720 (*Italics ours*):

"There is no doubt that in determining what supplies are necessities regard must be had to the character of the voyages or the employment in which the vessel is being used, nor that a more inclusive construction of the term has had to be adopted, as the uses to which vessels are put and the purposes for which they are employed have come to be more various in character. If she is employed in carrying passengers, part of the profits from her employment is, of course, obtained by supplying passengers' wants during the voyage. The longer the voyage and the more passengers carried, the greater will be the variety in kind of the articles which must be furnished to her for this purpose. The decision in *The Plymouth Rock*, 13 Blatchf. 505, Fed. Cas. No. 11,237, that supplies for use in the restaurant on board a passenger steamer were necessities, has never been, nor do I see how it could be, questioned. At least in cases like *The Long Branch*, above cited, where the voyages made were only of a few hours' duration, it might be possible to say that it is optional with

the owner whether to maintain a restaurant on board or not; but the probability that, if he did not, he would get fewer passengers to carry, seems to me to meet this objection. If passengers are carried, whatever may be reasonably supposed to meet the ordinary wants of the class of passengers expected must, I think be necessities, whether strictly essential to their safety and comfort or not. Judged by this test, I think the liquors furnished by the libelant may fairly be called necessities. The *J. S. Warden* (D. C.) 175 Fed. 314, a recent decision by Judge Hand in the New York Southern District, tends to confirm this conclusion. It was there held that the services of a bartender rendered on board a passenger-carrying vessel are maritime and secured by a lien on the vessel, because they are in aid of the purposes of the voyage, notwithstanding the earlier decisions that the only services on board which confer a lien are such as aid in the navigation or preservation of the ship. I hold, therefore, that the libelant acquired a lien under the state statute."

#### D. *Departmental Decisions.*

An opinion, rendered by the Honorable Richard Olney on December 1, 1894, to the Secretary of the Treasury, involved the question of refund of duties on certain coal which had been withdrawn from a warehouse for the purpose of fueling ocean steamers.

The contention of the applicants for the refund is embodied in the Attorney General's opinion, *21 Opinions of the Attorney General*, 92. At page 93, Mr. Olney gave the following definition of sea stores:

“It is claimed by the applicant that the coal is within this proviso, because it is ‘not merchandise,’ and they base this claim mainly on an argument that it can not be merchandise because, having been withdrawn for use in fueling ocean steamers, it comes within the class of ‘sea stores.’ This claim, however, is based upon a misunderstanding. ‘Sea stores,’ in our tariff legislation, are the stores contained in incoming vessels which are necessary for their use for the purposes of the voyage. These stores are plainly enough merchandise when purchased, and they are so treated by the statutes (Rev. Stat., sec. 3111) until put aboard ship. They then become, practically speaking, part of the equipment of the ship, which equipment, like the ship itself, is exempt from duty, because, though personal property, it is not regarded as an import. (*The Conqueror*, 49 Fed. Rep. 99, 103, 105.) This seems to have been assumed from the very beginning of our Government, it being taken for granted that sea stores were exempt from duty even before they were expressly made exempt. The name was always restricted to articles which, brought into port aboard ship, were to be consumed aboard or carried off again on the outward voyage; or, if put ashore at all, landed only for the convenience of the ship itself. (See Act of August 4, 1790, chap. 35, sec. 22; Act of Mar. 2, 1799, chap. 22, sec. 45; Rev. Stat., secs. 2795, 2796, 2797.) Articles do not become ‘sea stores’ until they have thus become part of the ship’s equipment.”

It was, therefore, in pursuance of a long applied doctrine of sea law and a consistent legislative policy that since the adoption of the Eighteenth Amendment and the passage of the National Prohibition Act, the Treas-

ury Department promulgated the regulations governing sea stores of liquors which are now in force.

These regulations represent the construction heretofore placed by the Government on the Eighteenth Amendment and on the National Prohibition Act in relation to foreign vessels and vessels of the United States in foreign trade.

Under these regulations the Eighteenth Amendment and the National Prohibition Act are held not to be applicable to intoxicating liquor carried as sea stores on American or foreign vessels within our territorial waters.

This construction by the Government, made when the statute was first passed and continued for over a period of three years, is a clear indication of the intention of Congress in passing the Act and is a most conclusive argument in support of the contentions made herein by Appellant.

The Treasury regulations referred to are as follows:

Treasury Decision 38218.

“SEA STORES—LIQUORS

“Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 106 and 107 of the Customs Regulations of 1915 amended.

“Treasury Department,  
December 11, 1919.

“To Collectors of Customs and Others Concerned.

“All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

“Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

“Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same Line or owner.

“Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(signed) JOUETT SHOUSE, Assistant Secretary”

Treasury Decision 38248, amended the preceding as follows:

“SEA STORES—LIQUORS.

“Opinion of the Attorney General with respect to the practice under T. D. 38218 of sealing liquors listed as sea stores on vessels while in ports of the United States. Distinction made between American and foreign vessels. T. D. 38218 amended.

“Treasury Department, January 27, 1920

“To Collectors of Customs and Others Concerned:

“Attention is invited to the appended copy of an opinion rendered the Department by the Attorney-General with respect to the practice under T. D. 38218 of sealing liquors carried as sea stores on all vessels while in the ports of the United States, as indicated by the questions submitted to him.

“Following the opinion of the Attorney-General the first paragraph of T. D. 38218 is hereby amended to read as follows:

“All liquors which are prohibited importation but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on foreign vessels should be sealed on arrival of the vessel in port, and such portions thereof released from seal as may be required from time to time for use by the officers and crew.

“The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification.

JOUETT SHOUSE,  
Assistant Secretary.”

The letter referred to in Treasury Decision 38248 was a letter from Mr. Palmer, then Attorney General, to the Secretary of the Treasury, dated January 23, 1920. It is as follows, 32 Opinions of Attorney-General 96:

“Department of Justice  
January 23, 1920.

“Sir: I have the honor to acknowledge receipt of your letter of January 20th, enclosing a letter from the Secretary of State with a communication from the Italian Embassy regarding instructions given to collectors of customs in Treasury Decision No. 38218 of December 11, 1919, requiring that all liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose. You ask my opinion upon the following questions:

“ ‘1. Are the instructions mentioned and the practice of the customs officers in accordance therewith authorized under the law?

“ ‘2. If permissible in part but not in their entirety, to what extent should they be modified to meet legal requirements and to restrain as far as possible the prevalent practice of smuggling liquor stores from vessels in ports of the United States?

“ ‘3. Should there be any difference in practice as between American and foreign vessels in such matters?’

“With respect to American vessels it is sufficient to say that the Prohibition Law applies as well on board such vessels while in American ports as at any other point within the United States. As to such vessels I do not think the validity of

the regulation mentioned can be successfully questioned.

“The status of foreign vessels in American ports, however, is somewhat different. I think the state of international law on the subject of private vessels in foreign ports is, generally speaking, this:

“ ‘So far as regards acts done at sea before her arrival in port and acts done on board in port, by members of the crew to one another, and so far as regards the general regulation of the rights and duties of those belonging on board, the vessel is exempt from local jurisdiction; but, if the acts done on board affect the peace of the country in whose port she lies, or the persons or property of its subjects, to that extent that State has jurisdiction.’ Moore’s International Law Digest, Vol. II, page 297.

“The complaint made against the Treasury decision mentioned is that by requiring liquors properly listed as sea stores to be kept under seal during the time such vessels are in American ports it prevents the distribution to the crews of the usual amount for daily consumption, which in the case of Italian vessels it is said is required by the contracts with the crews.

“I agree entirely that excessive or surplus liquor stores are subject to seizure and forfeiture, but I am not prepared to say that the daily distribution to the crews of the usual quantity for consumption on board the ship so affects the peace of this country that American officials are authorized to interfere. Of course, the bringing of such liquors on shore, even by the members of the crew to whom they are issued, will be unlawful and subject the offender to prosecution, but so long as the liquors on board are properly listed as sea stores,



and are not excessive in quantity I do not think their daily distribution on board the ship can properly be interfered with by this Government.

"I am therefore of opinion that the regulations should be modified to the extent above indicated.

Respectfully,

A. MITCHELL PALMER,

"To the Secretary of the Treasury."

It was under the provisions of these Treasury regulations, which have been strictly followed in all respects, that the appellant kept, when within the territorial waters of the United States, as sea stores on board its vessels, liquor which it had lawfully purchased in foreign ports.

It is understood to be the uniform practice of this Court when interpreting a statute which may be ambiguous or of doubtful applicability to a situation to give great weight to the construction actually put on it by the executive department and officers actually enforcing it.

*Edward's Lessee v. Darby*, 12 Wheat 206.

*U. S. v. Gilmore*, 8 Wall. 330.

*Smythe v. Fiske*, 23 Wall. 374, 382.

*U. S. v. Moore*, 95 U. S. 760, 763.

*Brown v. U. S.*, 113 U. S. 568, 571.

*U. S. v. Philbrick*, 120 U. S. 52, 59.

*U. S. v. Hill*, 120 U. S. 169, 183.

*Schell's Executors v. Fauché*, 138 U. S. 562.

*U. S. v. Alabama &c. Ry.*, 142 U. S. 615, 621.

*Taylor v. U. S.*, 207 U. S. 120, 125.

II. *Intoxicating liquors, having the status of sea stores above described, and their situs on board a vessel*

*do not come within any of the prohibitions of the Eighteenth Amendment, although kept on board a vessel of the United States within territorial waters of the United States.*

The provisions of the first section of the Eighteenth Amendment are as follows:

“Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”

*A. Intoxicating liquors incorporated as sea stores on a vessel, are not the subject of “importation into” the United States.*

An importation involves bringing merchandise within the limits of a port of entry with the intention of unloading it there. Sea stores are, in the first place, not merchandise and, in the second place, they are not brought within a port of entry with the intention of unloading them.

*The Schooner Mary*, 1 Gall. 206, 16 Fed. Cas. 932 (1812).

*Arnold et al. vs. United States*, 9 Cranch. 104 (1815).

*United States vs. Lyman*, 1 Mason 482, 26 Fed. Cas. 1024 (1818).

*Brown vs. The State of Maryland*, 12 Wheat. 419 (1827).

*Meredith vs. United States*, 13 Pet. 486 (1839).

*Harrison vs. Vose*, 9 How. 372 (1850).

*United States vs. Ten thousand cigars* (1855),

2 Curt. 436, 28 Fed. Cas. 38, citing *U. S. vs.*

*Vowell*, (1809) 5 Cranch. 368.

*The steamer Missouri*, 4 Ben. 410 (1870), af-

firmed 9 Blatchf. 433 (1872).

*United States vs. Eighty-five Head Cattle*, 205

Fed. 679, 681 (1913).

In fact the distinction between an importation and sea stores runs throughout our entire Customs legislation as evidenced by the Statutes and cases cited above.

In the case of *The Conqueror*, 166 U. S. 110, (1896), Mr. Justice Brown spoke as follows, at page 115:

“Vessels certainly have not been treated as dutiable articles, but rather as the vehicles of such articles, and though foreign built and foreign owned, are never charged with duties when entering our ports, though every article upon them, that is not a part of the vessel or of its equipment or provisions, is subject to duty, unless expressly exempted by law \* \* \*.”

And further, at page 118:

“But the decisive objection to the taxability of vessels as imports is found in the fact that, from the foundation of the Government, vessels have been treated as *sui generis*, and subject to an entirely different set of laws and regulations from those applied to imported articles. By the very first act passed by Congress in 1789, subsequent to

an act for administering oaths to its own members, a duty was laid upon 'goods, wares and merchandise' imported into the United States, in which no mention whatever is made of ships or vessels; but by the next act entitled 'An act imposing duties on tonnage' a duty was imposed 'on all ships or vessels entered in the United States' at the rate of six cents per ton upon all such as were built within the United States, and belonged to American citizens; of thirty cents per ton upon all such as should thereafter be built within the United States, belonging to subjects of foreign powers, and of fifty cents per ton upon all other ships or vessels, with a proviso that no American ship or vessel employed in the coasting trade or fisheries should pay tonnage more than once in any year. This distinction between 'goods, wares and merchandise' and 'ships or vessels', has been maintained ever since although the amount of such duties has been repeatedly and sometimes radically changed \* \* \*."

B. *When a vessel passes out of our territorial waters sea stores are not the subject of "exportation from" the United States.*

Exportation means at least a sending out with an intention to land in a foreign country and that the goods exported should enter into the mass of things belonging to and situate in such country.

In *Swan and Finch Co. vs. United States*, 190 U. S. 143, the question arose as to whether lubricating oils manufactured from imported rape seed, on which duty had been paid, and other oils which were for use on board and to be consumed by the vessel was such an exportation of

the oils as to entitle the sellers to drawbacks under Sec. 22 of the Act of August 28, 1894, re-enacted as Sec. 33 of the Act of July 27, 1897.

In determining this question, which it will be observed is almost exactly the question with which we are faced in determining whether sea stores are subject to "exportation from" the United States, Mr. Justice Brewer, speaking for the Supreme Court, said at page 144:

"\* \* \* Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country. 'As the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other'. 17 Op. Attorneys General 583.

"True, the context may sometimes give to the word a narrower meaning, and in the execution of the administrative affairs of government it may have been applied to cases in which there was not in the full sense of the term an exportation, yet these are exceptions and do not destroy its general signification. It cannot mean simply a carrying out of the country, for no one would speak of goods shipped by water from San Francisco to San Diego as 'exported' although in the voyage they are carried out of the country. Nor would the mere fact that there was no purpose of return justify the use of the word 'export'. Coal, placed on a steamer in San Francisco to be consumed in propelling that

steamer to San Diego would never be so designated. Another country or state as the intended destination of the goods is essential to the idea of exportation."

The same principle was laid down by the Honorable Charles J. Bonaparte in an opinion rendered to the Secretary of the Treasury on December 4, 1908, on the question of the withdrawal of whiskey from bond for transportation to foreign ports and re-importation. 27 *Opinions of the Attorney General*, 113.

Furthermore, to constitute "exportation" the goods must originate in the country from which they are claimed to be exported. Sea stores of liquor can not under the law originate here.

At the argument in the Court below the Government admitted that there was not any question of "importation" or "exportation" of these sea stores, and it is assumed that there will not be any claim to the contrary in this Court.

C. *Intoxicating liquors incorporated into sea stores whilst kept on board a vessel of the United States, moving in territorial waters, are not the subject of "transportation within" the United States.*

The situation of sea stores kept on board a vessel while moving within the territorial waters of the United States is not in any way whatsoever affected by the decision of this Court rendered May 15, 1922, in the cases

of *Grogan vs. Walker & Sons*, and the *Anchor Line vs. Aldridge*.

In both those cases there was a carriage of merchandise consigned by a shipper to a consignee and one part of the transportation between the shipper and the consignee was within the United States. Freight was paid for this transportation. Even if the geographical distance of such transportation was very small, still there was no escape from the conclusion of this Court, that the case involved the question of liquor as merchandise on its way from a shipper to a consignee and during that transit passing within the jurisdiction of the United States.

We contend that these cases do not touch the situation presented in the present case.

The present case comes precisely within the decision of the United States Supreme Court in *Street vs. Lincoln Safe Deposit Co. et al.*, 254 U. S. 88, which, as we read the case, was decided on the ground that the liquor had been lawfully acquired and was lawfully in possession of the plaintiff, and was to be lawfully used.

It was not in transit from a shipper to a consignee but it was in a lawful situs in the ownership and possession of a man who had lawfully acquired it. That is exactly the condition here.

As was said in the case of *Gloucester Ferry Co. vs. Pennsylvania*, 114 U. S. 196 (1884), by Mr. Justice Field, at page 203:

“\* \* \* Transportation implies the taking up of persons or property at some point and putting them down at another. \* \* \*”

Therefore, transportation necessarily involves a separation of the vehicle from the thing carried at the end of the voyage or journey.

In his opinion in the District Court, Judge Hand attempted to square his decision with the requirements laid down for transportation in the *Gloucester Ferry Company* case by saying that the sale of sea stores of liquor on the high seas to a passenger was a consummation of a transportation because the title to the liquor and the possession thereof was passed to the passenger as its ultimate destination when he drank it on board the vessel.

He compares the situation to that of a collier which might clear from our ports to coal friendly cruisers at sea as happened during the early part of the European war.

Judge Hand is wrong in his decision and his simile is not apt.

In the case of the collier clearing to coal friendly cruisers, the intention would have been to deliver the coal to the friendly cruiser and thus to separate the coal from the collier. That would be a situation which would fall within the definition of transportation contained in the *Gloucester Ferry Company* case.

But, in the present case, there is not any segregation of the sea stores from the vessel when they are bought and used by a passenger on board the vessel.

Taking merchandise on board a vessel at one place and carrying it to another place and there putting it off the vessel is of the essence of transportation in the ordinary use of the word.

In the present case there is not any separation of the sea stores from the ship. They are not set down at any point. They are acquired and taken on board for



the purpose of consumption on board. They are incorporated, as it were, into the body of the ship as a part of her equipment to perform the business of a passenger carrier. Sea stores are really aids to transportation. They are not subjects of transportation as ordinary goods in commerce are.

Whilst, of course, all parts of the vessel, including her masts, spars, tackle and apparel, as well as her sea stores, necessarily move with her when she moves, they are not being transported in the sense of that word as understood by our statutes or case law.

They are not "merchandise" because sea stores are not intended to be introduced into the body of commodities of this or any other country. They are part of the ship and a necessary part.

It has been settled by the decision of this Court in the case of *The Conqueror*, 166 U. S. 110, that a ship or vessel is not "articles", "goods, wares or merchandise" and that when coming into our ports she is not subject to Customs laws as such.

The greater must include the less.

III. *The possession of intoxicating liquors lawfully acquired and kept sealed as sea stores is legal within the territorial waters of the United States.*

It is to be observed that the Eighteenth Amendment does not make either the purchase or the possession of intoxicating liquors for beverage purposes illegal. Consequently, if the National Prohibition Act should seek to

make possession a crime and unlawful, it would be obviously unconstitutional.

In view of the fact that the Amendment does not prohibit possession, it is not within the right of Congress to say a possession under the Amendment shall be unlawful.

Possession *per se* is not unlawful. The most that can be claimed from the fact of possession is that, under the circumstances of a particular case, possession may indicate that some prohibition of the Amendment may have been violated.

That is all that the National Prohibition Act does or could do.

Section 25 of the National Prohibition Act provides (Italics ours)—

“It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor *intended for use in violating this title*  
\* \* \*

Section 33 provides—

“After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect,

the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used."

Inasmuch as the Amendment does not prohibit possession of intoxicating liquors, it is submitted that the statute passed for the enforcement of the Amendment cannot make it illegal to possess liquors lawfully acquired and intended for lawful use.

In other words, an assistant statute passed for the enforcement of the Amendment cannot be broader than the Amendment, and cannot make crimes of acts not prohibited by the Amendment.

This is conclusively shown by the Supreme Court decision in *Street v. Lincoln Safe Deposit Company*, 254 U. S. 88 (1920), where Mr. Justice Clarke says, at pages 93-94, in dealing with Sections of the National Prohibition Act above quoted:

"Thus it is plain that in the sections of the act relied upon there is no specific prohibition against the storage of liquors under the circumstances admitted to exist in this case, and we find no other provisions by which such a custody is rendered unlawful."

And so in this case there is no provision against a vessel of the United States having lawfully acquired liquors among her sea stores whilst she is in the territorial waters of the United States.

The *Street* case shows conclusively that there can be a legal possession of liquors other than a possession specifically made legal under the Act.

In the *Street* case there was no express warrant in the Act for possessing the liquors while moving them through the streets of New York.

The *Street* case further shows that the possession or unexplained presence of intoxicating liquors merely gives rise to a presumption of illegality, which presumption can be rebutted by showing that the liquor was lawfully acquired and intended for lawful use.

When it is shown, as in this case, that the liquor was lawfully acquired and that there is no intention to violate the provisions of the Act, any possible presumption of illegality in the possession is met and defeated.

On this point, Mr. Justice Clarke said in the *Street* case, 254 U. S. 88, at page 94:

“Assuming that the unexplained presence of the liquors in the Company’s warehouse would give rise to the prescribed presumption, yet, if that presumption should be rebutted by appropriate testimony (as it is in this case by admissions) that the liquor to which it is applied is not being kept for the purpose of sale, barter, exchange, furnishing or otherwise disposing of it in violation of the provisions of the title, the implication is plain that the possession should be con-

sidered not unlawful, even, though it be by a person 'not legally permitted,'—that is by a person not holding a technical permit to possess it, such as is provided for in the Act."

Any other holding would be to attribute to Congress an intention to confiscate private property lawfully acquired and intended for lawful uses.

This was pointed out by Mr. Justice Clarke in the *Street* case, at page 95:

"An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law which have ample field for other operation in effecting a purpose clearly indicated and declared."

There remains to be considered the question of the applicability of the Eighteenth Amendment and the National Prohibition Act to vessels of the United States outside the territorial waters of the United States.

If, as we contend, the Eighteenth Amendment and the National Prohibition Act do not apply to vessels of the United States in such situations, then possession with intention to sell outside the territorial waters of the United States is not a possession of liquor "*intended for use in violating*" the provisions of the National Prohibition Act.

## SECOND POINT.

THE DISTRICT JUDGE ERRED IN HOLDING THAT VESSELS OF THE UNITED STATES ON THE HIGH SEAS AND IN FOREIGN PORTS ARE TERRITORY SUBJECT TO THE JURISDICTION OF THE UNITED STATES WITHIN THE MEANING OF THE EIGHTEENTH AMENDMENT AND SUBJECT TO THE PENALTIES OF THE NATIONAL PROHIBITION ACT, AND HENCE WERE NOT FREE TO SELL INTOXICATING LIQUORS ON THE HIGH SEAS AND IN FOREIGN PORTS.

1. *The Text of the Eighteenth Amendment.*

The text of the Eighteenth Amendment, which the National Prohibition Act was passed to enforce, is as follows:

“Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

“Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.”

2. *The Eighteenth Amendment was not necessary to give Congress power to legislate*

a. *For lands subject to the jurisdiction of the United States and not included among the several States, or*

*b. For vessels of the United States engaged in foreign or coastwise commerce.*

Before the Eighteenth Amendment was passed, Congress had power to legislate regarding liquor traffic in the exercise of police power within the territories over which it held legislative powers, such as the District of Columbia, the Indian Reservations, the Territories, Alaska, the Panama Canal Zone and our overseas possessions.

It also had power to legislate and did pass much legislation in connection with liquor traffic in interstate commerce.

In the Wilson Act of August 8, 1890, 26 Stat. 313, known as the Original Package Act, there was a provision allowing States bordering on the Mississippi River, in the exercise of their police powers, to exact a license fee as a condition of the right to sell intoxicating liquors over the bar on board steamboats navigating the Mississippi whilst within the boundaries of such State. Such license fees were approved. *Foppiano v. Speed*, 199 U. S. 501, 520.

There was also a provision in the Wilson Act to the effect that if liquors were delivered in a State in the original packages, they were not thereby exempted from the operation and effect of the laws passed by the State of destination in the exercise of its police powers.

Later, in the so-called Webb-Kenyon Act, enacted by Congress on March 1, 1913, 37 Stat. 699, the shipment in interstate commerce of intoxicating liquors whether in

the original package or otherwise, in violation of the law of the State of destination was prohibited.

*Adams Express Company v. Kentucky*, 238 U. S. 190 (1915).

The object of this law was to keep interstate commerce from being used to further unlawful purposes by shipment of goods into prohibition States or areas.

On March 3, 1917, Congress passed the Act to prevent the manufacture and sale of intoxicating liquors in the District of Columbia. 39 Stat. 1123.

In the same year Congress passed the Alaska Prohibition Act of February 14, 1917.

It was, therefore, obviously not necessary to have any prohibition amendment to enable Congress to exercise such police powers as might seem to it fit

(a) over territory in respect of which it had legislative powers or

(b) in regard to matters, such as interstate and foreign commerce, over which it was given legislative powers by the Constitution.

The Eighteenth Amendment, so far as the vesting of power in Congress was concerned, therefore, did not add anything to the powers Congress already possessed in a large field of legislation.

One principal effect of the amendment was, however, to break down State lines and give Congress the power to legislate in respect of matters involving liquor, which had never crossed a State boundary, in a way which would not have been possible in the absence of the amendment.



This aspect of the situation has been emphasized in the case of *United States v. Lanza*, decided December 11, 1922, and not yet reported, in which it was held that a prosecution under the National Prohibition Act was not barred by a conviction under a State Act.

Mr. Chief Justice Taft, speaking for this Court, said of the Amendment, at page 3 of the printed advance sheet of the opinion, (*Italics ours*):

“The Amendment was adopted for the purpose of establishing prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate, as well as those pertaining to interstate or foreign commerce. The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist.”

The Eighteenth Amendment was the direct exercise of the police power in respect of liquor by the people of the United States in their Sovereign capacity. It incorporated in the basic law of the land full prohibition against intoxicating liquor for beverage purposes.

Before the amendment both Congress and the States in the absence of provisions in their own constitutions might have changed their policy with regard to liquor traffic, but since the amendment any legislation except to enforce the amendment is unconstitutional.

The amendment was in fact a mutual surrender of the exclusive legislative rights of Congress and of the States regarding questions involving prohibition.

This effect is, perhaps, best described by Mr. Chief Justice Taft in *United States v. Lanza*, at page 3 of the printed advance sheet:

“To regard the Amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each State possessed that power in full measure prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, state power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State’s power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits.”

But, however much we may search the Amendment and the National Prohibition Act, the arguments and the reports in Congress which led up to their adoption, we cannot find any sign of an intention to cover vessels of the United States or other objects outside the *territorial* limits of the United States.

Vessels of the United States are not literally within the Amendment.

It should be remembered also that the Eighteenth Amendment has to be read as any other amendment of the Constitution is read. It is only by and in the National Prohibition Act that broad construction is required.

In the Constitution more, perhaps, than elsewhere words must be assumed to have the meaning they have in common use at the time when the Constitution or an amendment to it is adopted. *Tennessee v. Whitworth*, 117 U. S. 139.

There was not any power expressly vested in Congress by the Prohibition Amendment to legislate for vessels of the United States.

Congress already had the power to legislate prohibition for vessels of the United States under the Commerce Clause.

The fact that Congress already had under the Commerce Clause this power which had not been exercised indicates clearly that the Eighteenth Amendment should not be used as a basis for contending that Congress legislated in the Enforcements acts for prohibition on vessels of the United States.

The reason that Congress has not exercised its power to legislate as to prohibition under the Commerce Clause for vessels of the United States is probably because it has realized that vessels of the United States could not compete in international trade with other vessels if prohibition should be enforced on board our vessels.

As the only claim of the Government that vessels of the United States are prohibited from selling liquor on the high seas and in foreign ports is based on the Eighteenth Amendment and the National Prohibition Act it is necessary to consider the Amendment and the Act in detail in order to point out the fallacy of the Government's contention for reasons additional to those just given.

3. *Vessels of the United States are not "territory subject to the jurisdiction of the United States" within the meaning of the Eighteenth Amendment, nor are they subject to the National Prohibition Act.*

The fact that Congress, when it passed so comprehensive and sweeping an act as is authorized by the second section of the amendment to enforce the provisions of the first section, made absolutely no reference to violations of the amendment, or the act, on vessels of the United States upon the high seas or in foreign ports, goes far to support the construction that the amendment does not apply to such vessels in such places.

If it had been contemplated by Congress that the amendment and the enforcement acts were to apply to vessels of the United States upon the high seas or in foreign ports, is it not reasonable to assume that Congress would have said so?

The National Prohibition Act was not an act passed by the Government to defend itself against fraud wherever perpetrated as was the case in *United States vs. Bowman*, United States Supreme Court, November 13, 1922, not yet reported. It was a statute passed to punish acts which had hitherto been lawful and which became unlawful only when performed within those territories to which the Constitution extends. The Constitution does not follow a vessel of the United States to sea. *In re Ross*, 140 U. S. 453.

The National Prohibition Act and the Supplemental Act of November 23, 1921, are the strictest kind of territorial legislation and are logically dependent on locality

for the Government's jurisdiction. Such laws have never been held to have any force without the strict territorial limits of the United States or its organized territories even though they embody as this law does a national policy. *American Banana Company vs. United Fruit Company*, 213 U. S. 347.

The limitation of the National Prohibition Act to the territorial limits of the United States has already been recognized in the *National Prohibition Cases*, *supra*, wherein Mr. Justice Vandevanter said, p. 386 (Italics ours):

“The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, \* \* \*”

The statute is territorial legislation and the acts prohibited are unlawful only when performed within the territorial jurisdiction of the United States. The Statute is logically dependent on the locality of the acts for the Government's jurisdiction.

It is natural, therefore, to suppose that if Congress had intended to punish as crimes any acts committed outside of the strict territorial jurisdiction of the United States, it would have said so, and that the failure to say so negatives the purpose of Congress in that regard. *United States vs. Bowman*, *supra*.

Furthermore, the statutes of Congress have never been held to apply to the internal affairs of vessels. *Brown vs. Duchesne*, 19 How. 183; *Taylor vs. U. S.*, 207 U. S. 120; *Scharrenberg vs. Dollar Steamship Co.*, 245 U. S. 122; *United States vs. Inness*, 218 Fed. 705.

Even in the case of the Seamen's Act of 1915, which embodied a national policy, and which, by Section 11, prohibited, in the most general terms, advance payments of wages to seamen, it was held that the Statute did not prohibit advance payments of wages by an American vessel in a foreign port. *Neilson vs. Rhine Shipping Company*, 248 U. S. 205.

The language employed in the Eighteenth Amendment is inappropriate to a prohibition of the forbidden acts upon the high seas.

The significant words are "manufacture, sale, or transportation of intoxicating liquor within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof." These are all phrases appropriate to land.

If it had been intended to prohibit the manufacture and sale on board of, or the transportation by, a vessel of the United States upon the high seas or in foreign ports, of intoxicating liquors, one would never have spoken of prohibiting the "*manufacture or sale within*" a vessel, and certainly not the "*transportation within*" a vessel; and more manifest still, one would never speak of "*importing into*" or "*exporting from*" a vessel. The phrases would have been transportation, or importation, or exportation *by* a vessel, and manufacture or sale *on board* a vessel.

The fact is that the Amendment does not purport to prescribe prohibition with reference to places such as buildings or vehicles, but to geographical limits within which no manufacturing, selling, transporting, importing or exporting shall be carried on.

In that sense the words employed are most accurate and appropriate, but they are entirely out of accord with any use that would refer to the prohibited acts on board ships upon the high seas or in foreign ports.

This construction finds support in the phraseology of the Thirteenth or Slavery Amendment. It was said in regard to the Thirteenth Amendment by Mr. Justice Brewer in *Clyatt v. United States*, 197 U. S. 207, "This amendment denounces a status or condition." It is very evident that the intent was to make it operative wherever an amendment to the Constitution could reach, and so the words "within the United States or any place subject to their jurisdiction," not any *territory* subject to their jurisdiction, were used.

But the Eighteenth Amendment does not create a status; it prohibits certain acts. And the natural limits of a prohibition are certainly geographical unless it is made clearly evident by appropriate language that the prohibition is to operate with respect to things, such as ships upon the high seas and in foreign ports, as well as to operate within territorial limits.

The construction which we contend should be placed upon the words "territory subject to the jurisdiction thereof" is in accord with the prior use of the word "territory" in the Constitution. It appears in Article 4, Section 3, which provides:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

This provision has received as careful and extended consideration by the Supreme Court as any provision of the Constitution. Particularly did its meaning become of the greatest importance following the acquisition of Porto Rico and the Philippine Islands by the Treaty of Peace with Spain at the conclusion of the Spanish-American War.

An examination of the decisions of the Supreme Court in the *Insular Cases* (*De Lima v. Bidwell*, 182 U. S. 1; *Dooley v. United States*, 182 U. S. 222; *Downes v. Bidwell*, 182 U. S. 244; *Dorr v. United States*, 195 U. S. 138) shows beyond controversy that the word "territory" as there used in the Constitution referred to the lands acquired by the United States by purchase, acquisition, cession or voluntary association as in the case of Hawaii.

This accords with the earlier construction expressed in the opinion of Mr. Justice Thompson in the case of *United States v. Gratiot*, 14 Peters 526, wherein he defined the word "territory" as follows:

"And the constitution of the United States (article four, section three) provides, 'That Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States, and this power is vested in Congress without limitation, and has been considered the foundation upon which the territorial governments rest."



Given its broadest meaning, the word "territory" as used in the Eighteenth Amendment cannot, under any accepted authority, be accorded a meaning which extends the prohibition embodied in the amendment to anything else than lands under the jurisdiction of the United States.

The rule of construction was succinctly stated by Mr. Chief Justice Waite in *Tennessee v. Whitworth*, 117 U. S. 139:

"Words in a Constitution as well as words in a statute, are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary."

The Eighteenth Amendment is an amendment to the Constitution, and we submit, only reaches those territories to which the Constitution has been applied.

It is claimed by those who seek a contrary construction, that the reason why the amendment should be held to apply to ships is because the Constitution follows the flag. This, of course, is not a correct statement of law. If any constitutional principle has become established, it is that the Constitution does not follow the flag. On the contrary, while the American flag flies over all territories and places subject to the jurisdiction of the United States, the Constitution only applies to those territories and places to which it has been extended by express act of Congress.

This principle was stated by Mr. Justice Brown in delivering the opinion in *Downes v. Bidwell*, 182 U. S. 244, p. 278, in the following words (Italics ours):

“Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that *the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct.*”

And in *Dorr v. United States*, 195 U. S. 138, Mr. Justice Day, delivering the opinion of the court enunciated the same principle:

“We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, Sec. 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that *the Constitution does not, without legislation and of its own force, carry such right to territory so situated.*”

In other words, except as expressly extended by Congressional action, the guarantees of the Constitution do not extend beyond the territorial limits of the United States, except when and so far as express provision therefor is made.

This was the principle underlying the decision of the Supreme Court in *In re Ross*, 140 U. S. 453, wherein the Court held that an American citizen, who committed a murder on an American vessel in the harbor of Yokohama, Japan, and who was tried before the United States

Consular General Court in Japan, under and by virtue of the Treaty of June 17, 1857, which conceded to American Consuls in Japan authority to try Americans committing offenses in that country, could not invoke the provisions of the Constitution which guaranteed the right of trial by jury. Mr. Justice Field, delivering the opinion, said at page 464 (Italics ours) :

“By the Constitution a government is ordained and established ‘for the United States of America’, and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook v. United States*, 138 U. S. 157, 181. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, *yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States.*”

Until Congress expressly extends the privileges of the Constitution to the vessels of the United States it is submitted that it would be improper to extend its punitive provisions by inference to such vessels.

Congress has not extended the Constitution to the Philippine Islands, Hawaii or Porto Rico, except in a limited way, for the acts of Congress creating organized governments in those territories are grounded upon the principle which we have just discussed.

It is open to question whether the Eighteenth Amendment applies to all territories outside of the United States proper which may be subject to the jurisdiction of the United States. That it does not do so to its full extent seems necessarily to follow from the very legislation by which the Eighteenth Amendment is to be enforced.

Certainly, it cannot be denied that the Panama Canal Zone has an organized government. But Congress, after expressly enacting that

“It shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one’s possession or under one’s control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt, or spirituous liquors, except for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes, under regulations to be made by the President, and any such liquors within the Canal Zone in violation hereof shall be forfeited to the United States and seized,”

appended this qualification:

*“Provided, That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad.”*

If the Constitution, and the Eighteenth Amendment as an amendment thereof, were applicable to territories subject to the jurisdiction of the United States having organized governments, without an express extension thereof by an act of Congress, then Congress did not have the authority to enact that statute, because it embodies a limitation upon the operation of the Amendment.

The first section of the Amendment prohibits the

*“manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof.”*

The second section of the Amendment expressly confers upon Congress and the several States concurrent power to enforce the first section by appropriate legislation. This constitutes not only a grant of power, but a limitation upon the power of Congress, for the only legislation which Congress can pass where the Constitution applies is legislation to enforce the first section of the Amendment. It cannot enact legislation which will lessen or detract from the operation of prohibition over those territories to which the Constitution applies. This was clearly stated by Mr. Justice Van Devanter as the seventh conclusion of the Supreme Court in the *National Prohibition Cases*, *supra*, wherein he said (Italics ours):

“The *second section* of the Amendment—the one declaring ‘The Congress and the several States shall have concurrent power *to enforce* this article by appropriate legislation’—*does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means.*”

If, therefore, the Constitution, and the Eighteenth Amendment, as an amendment thereof, applied to the Canal Zone without the aid of Congressional legislation making it expressly so applicable, then Congress could not have defeated or thwarted the amendment, even in part, by providing that the transportation of liquor through the Canal Zone or on the Panama Railroad should be permitted.

Certainly the broad right to transport liquor through the Canal or on the Railroad, without requiring the presence of the factor which lead the Supreme Court to hold in *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88, that the movement of liquor was not a transportation within the meaning of the Amendment, would, if acted upon, constitute such a transportation as would be in violation of the Amendment, if by its terms it was applicable to the Canal Zone.

The exception of the Canal and the Railroad from the complete operation of the Enforcement Act thus constitutes the strongest possible proof that when Congress used the word “territory” in the Eighteenth Amendment it referred only to the organized territories of the United States, to which, by the act of Congress under the established principles of constitutional law, the

Constitution and Amendment had been extended. Otherwise a partial application of the Enforcement Act to the Canal and the Railroad could not have been made.

This practical construction which Congress has placed upon the Amendment is the best evidence of its intended scope. It shows that it has no application *ex proprio vigore* even to organized territories not incorporated in the United States.

Furthermore, if the amendment and the National Prohibition Act of their own force applied to the Panama Canal Zone, why did Congress think it necessary to pass section 20 expressly extending prohibition to the Canal? That Congress did not think that the Amendment and the National Prohibition Act of their own force applied to the Canal Zone, is shown by the exception made in section 20 with respect to liquor in transit through the Canal or on the railroad. The exception read:

“Provided *this section* shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad.”

Exempting liquor in transit through the Canal from the prohibition of section 20, left the situation with respect to such liquor as it would have been if section 20 had not been part of the Act so that if the Amendment and the National Prohibition Act applied of their own force, transportation of liquor through the Canal or on the railroad would be prohibited. Obviously, however, Congress intended to permit the carriage of liquor in transit through the Canal or on the railroad so that it must have been in the mind of Congress that the Amendment and the National Prohibition Act did not extend of its own

force to the Canal Zone but required the special provisions of section 20 to make the Amendment and the Act applicable thereto.

The action of Congress with respect to section 20 clearly indicates therefore that Congress did not consider that the Amendment and the National Prohibition Act had any force outside the strict territorial limits of the United States and that it was proper for them therefore to make merely a partial extension of the Amendment to the Canal Zone.

The oceans and the Canal connecting them are admittedly the great highways of commerce, and it was in the exercise of a wise judgment that the Congress made only a limited application of the Eighteenth Amendment to the Canal Zone, and thus permitted the free passage of international trade.

Surely the limited application of the Enforcement Act to the Canal Zone, however, was not for the purpose of permitting the vessels of other nations only to transport liquors freely through the Canal to the prejudice of American commerce and at the same time of denying a like privilege to the ships of the nation which constructed the Canal! Yet such will be the result if a construction should now be placed on the word "territory" by which it should be held to include vessels of the United States upon the high seas.

If the Amendment should be so interpreted, notwithstanding that the Supreme Court has said, in *In re Ross*, *supra*, that the Constitution does not apply to ships without the territorial boundaries of the United States, and in



the *Insular Cases*, *supra*, that the Constitution does not apply to the organized territories except when and so far as Congress shall direct, then the Amendment would be completely at variance with the construction which Congress has necessarily placed upon it by the exception of the Canal and Railroad from its operation.

The action of Congress in expressly authorizing ships regardless of nationality to carry liquor in transit through the Panama Canal, is the strongest possible argument that Congress did not regard vessels of the United States as "territory" as contended by the Government. If Congress had regarded American ships as "territory," it would not have permitted them to carry liquor through the Panama Canal. Certainly vessels of the United States cannot be "territory" while on the high seas and not "territory" while going through the Panama Canal.

We have the direct authority of this Court against such an interpretation of the words "territory subject to the jurisdiction of the United States" in *Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122.

*Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122, was a case involving an alleged violation of certain provisions of the Contract Labor Act, and it was held that a vessel of the United States was not "territory subject to the jurisdiction of the United States." In that case the steamship company employed as a seaman in Shanghai, a Chinaman who was transported to the port of San Francisco, where he was transferred to and shipped on the American steamer Mackinaw. The contract provided

that he should work in an American ship while in American ports and on the voyage back to Shanghai, with the privilege of transfer to any other British or foreign ship. The claim was that the seaman was a laborer, and had been brought into the United States within the meaning of the prohibition in the statute.

Section 2 (of the Act of February 20, 1907, c. 1134 as amended, Act of March 26, 1910, c. 128, sec. 1) provided that the following classes of aliens should be excluded from admission to the United States, among others:

“persons hereinafter called contract laborers who have been induced or solicited to migrate to this country by offers or promises of employment, or in consequence of agreements \* \* \* to perform labor in this country \* \* \*.”

Section 4 made it a misdemeanor to assist contract laborers into the United States, and Section 5 imposed a heavy penalty upon any persons, partnership or corporation violating Section 4 by knowingly assisting, encouraging or soliciting the importation of any contract laborer into the United States.

Section 33 of the Act provided, however, that for the purposes of the act (Italics ours):

*“The term ‘United States’, as used in the Title, as well as in the various sections of this Act, shall be construed to mean the United States and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone.”*

It was argued, in support of the Government claim, that the steamer *Mackinaw* was part of the territory of the United States, and that, therefore, contracting to bring the Chinaman to San Francisco and there to employ him upon the vessel, was knowingly to assist and encourage the migration of an alien contract laborer into the United States, for the purpose of having him perform labor therein, in violation of the fourth and fifth sections of the Act.

In denying the soundness of the contention, the Supreme Court was required to pass upon the meaning of the words "United States and any territory subject to the jurisdiction thereof", for the reason that such was the statutory definition accorded to the words "United States". These are the identical words used in the Eighteenth Amendment. Mr. Justice Clarke, in delivering the opinion of the court, said:

"Equally unallowable is the contention that a ship of American registry engaged in foreign commerce is a part of the territory of the United States in such a sense that men employed on it can be said to be laboring 'in the United States' or 'performing labor in this country'. It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense *this expression is obviously figurative* (International Law Digest, Moore, Vol. 1, Sec. 174), and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible. Thus the seamen employed on the 'Mackinaw' were not within either the spirit or

the letter of the law on which the petitioner bases his action and in any point of view his contention is fanciful and unsound and must be denied."

The presence of the words "in this country" in the statute, in conjunction with the definition of the words "United States" statutorily expanded to include "territory subject to the jurisdiction thereof", not only supports the conclusions of the court, but of themselves the words clearly indicate that the Congress was using the word "territory" with reference to land within the boundaries of the United States.

Thus this decision is a direct interpretation by the Supreme Court of the identical words used in the Eighteenth Amendment, and it sustains a construction which attributes to those words a meaning that "territory" does not include vessels of the United States upon the high seas.

See also *U. S. vs. Hughes*, 70 Fed. 972, D. C. E. D. South Carolina (1895).

As against this contention the Government urges that the word "territory" as used in the Amendment should not be accorded its physical and constitutional meaning, but that it is used, as said by Mr. Justice Clarke in *Scharrenberg v. Dollar Steamship Co.*, in its figurative sense, and that in such sense it includes vessels of the United States upon the high seas and in foreign ports.

On the contrary the fundamental canon of interpretation which should be applied to it, is the one so well stated by Mr. Justice Waite in *Tennessee v. Whitworth*,

117 U. S. 139: "Words in a constitution as well as words in a statute are always to be given the meaning which they have in common use, unless there are very strong reasons to the contrary."

Or, as is said in *Story on Constitution*, Sec. 401:

"Where the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation."

And in the foot note:

"In such cases the words are to be taken in the sense they naturally bear on their face."

The construction which we ask is that which has already been placed upon it by this Court in *National Prohibition Cases*, *supra*, wherein Mr. Justice Van Devanter said at page 386 (Italics ours):

"6. The first section of the Amendment—the one embodying the prohibition—is *operative throughout the entire territorial limits of the United States*, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits."

And as stated by Mr. Chief Justice White in his concurring opinion at page 391 (Italics ours):

"In other words, dealing with the new prohibition created by the Constitution, *operating throughout the length and breadth of the United*

*States*, without reference to state lines or the distinctions between state and federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the Amendment and the legislation of Congress enacted to make it completely operative."

Finally, as if to make it plain beyond controversy that the amendment was dealing with territorial limits in a legal sense, the Congress, in proposing the amendment, avoided the use of the broader language which has been embodied in the Thirteenth Amendment prohibiting slavery "within the United States *or any place* subject to their jurisdiction," and used the words "*territory* subject to the jurisdiction of the United States."

It had previously been decided that there were "places" even on land that were subject to the jurisdiction of the United States which were not "territory." *In re Lane*, 135 U. S. 1, 43; *Ex parte Morgan*, 20 Fed. 298, approved in *Kopel v. Bingham*, 211 U. S. 468.

It is unnecessary, however, to stress this point, since the Supreme Court, in the *National Prohibition Cases*, above referred to, has decided that prohibition "is operative throughout the *entire territorial limits* of the United States." The words "territorial limits" are words of limitation; they indicate boundaries within which the prohibition lies. "Territorial limits" plainly mean the limits of land. "Territorial limits" do not include the high seas or foreign ports.

A ship on the high seas or in foreign ports, even though subject to the jurisdiction of the United States

for certain purposes, cannot be said by any stretch of language to be within the "territorial limits" of the United States.

4. *The passage of the "National Prohibition Act" and the decisions thereon.*

The act entitled "National Prohibition Act", passed October 28, 1919, having been put into effect under regulations issued by the Treasury Department, certain test cases involving the act and the scope of the amendment itself came before this Court in March, 1920, and were decided on June 7, 1920.

In *The National Prohibition Cases*, 253 U. S. 350, it was stated by Mr. Justice Van Devanter as a conclusion of this Court, that:

"The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by state legislature, or by a territorial assembly—which authorizes or sanctions what the section forbids" (p. 386).

In the concurring opinion of Chief Justice White, it is stated that the new prohibition created by the Constitution operates "throughout the length and breadth of the United States without reference to state lines" (p. 391).

It was further held by this Court that the enforce-

ment power confided to Congress "is territorially co-extensive with the prohibition of the first section."

The power of Congress to legislate for the enforcement of prohibition within state lines is derived from and limited by the amendment. *The National Prohibition Cases*, 253 U. S. 350. In the announcement of the conclusions of the Court by Mr. Justice Van Devanter, it is stated that the National Prohibition Act was adopted "to enforce the amendment" (p. 385); that the second section of the amendment granting to Congress concurrent power to enforce the article enables Congress "only to enforce it by appropriate means" (p. 387); and that "it is a constitutional mandate or prohibition that is being enforced" (p. 387). In the concurring opinion of the Chief Justice it is said that the "effect, of the *grant of authority*, was to confer upon both Congress and the States *power to do things which otherwise there would be no right to do*" (p. 392. Italics ours).

The authority of Congress to enforce the prohibition provided by the amendment appears, therefore, to be limited to the territory over which the amendment by its terms extends the prohibition.

It does not follow, however, that because Congress has power to extend the enforcement that far it has, in fact, done so by the Enforcement Act. On the contrary, as will be shown, it may be doubted that the Enforcement Act does actually extend even over all the territory to which the Court says prohibition has been extended by the Amendment.



5. *The National Prohibition Act analyzed as to territorial scope.*

The first point to be determined, therefore, is, to what places does the National Prohibition Act, by its own terms, purport to apply?

Title II of the Act deals with "Prohibition of Intoxicating Beverages." Section 3 of this title provides:

"No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

There is no express provision anywhere in the Act defining the places or boundaries within which it shall apply.

The only provisions in it from which the intent of Congress in this respect may be inferred are in Section 2, Title II, which provides that

"The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed."

This implies that enforcement of the Act was expected only in organized Internal Revenue districts; in Section 11 of Title III which provides that alcohol may be with-

drawn under regulations from any industrial plant or bonded warehouse "tax free by the United States or any governmental agency thereof, or by the several States and Territories or any municipal subdivision thereof, or by the District of Columbia \* \* \*," again implying that the enforcement limits and regulations are bounded by the political organizations of states and territories; and in Section 20, which specifically extends the Act to the Canal Zone. These provisions seem to imply that it is to extend only over the places in the states and territories that are organized into collection districts.

In the absence of definite statements in the Act itself, the extent of its application is to be found in other statutes. The principal one of these is Section 1891 of the Revised Statutes, which provides as follows (*Italics ours*):

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect *within all the organized Territories and in every Territory hereafter organized, as elsewhere within the United States.*"

It would appear, however, that this general statute may not carry the Prohibition Act into all territory of the United States. For example, the Act of April 30, 1900, Chap. 339, creating the Territory of Hawaii, specifically provides that R. S. Section 1891 (above quoted) shall not apply to that territory; the Act of July 1, 1902; Chap. 1369, establishing the Government of the Philippine Islands, specifically provides that the provisions of R. S.

Section 1891 shall not apply to those islands; and the Act of March 30, 1917, Chap. 171, creating the government of the Virgin Islands, provides that, *unless Congress shall otherwise provide*, the laws regulating elections and the electoral franchise and the code of private law then existing in the islands, and the other local laws in force and effect there on the 17th of January, 1917, "shall remain in force and effect in said islands."

Even if it be assumed, as appears to be indicated by the decision in the *National Prohibition Cases* (pp. 386, 387), that the specific exemptions of Congress to the application of Section 1891 to some of the territories are invalidated by the amendment itself, yet as no territorial limits to the application of the Enforcement Act are found in it, recourse must still be had to Section 1891 of the Revised Statutes to determine the utmost extent to which the act can apply.

By that section of the Statutes, "the \* \* \* laws of the United States \* \* \* shall have the same force and effect within all the *organized Territories* and in *every Territory hereafter organized* as elsewhere within the United States."

This enumeration of localities would appear to be insufficient to include lands that are not within the United States proper, or territory that has not been organized as territory of the United States.

If the Amendment, for the lack of suitable enforcement legislation, does not as yet apply to all landed estate or territory subject to the jurisdiction of the United States, it seems obviously impossible to consider it as applicable to personal property such as ships.

6. *The National Prohibition Act does not by its terms apply and was not intended to apply to vessels of the United States on the high seas or in foreign ports.*

We have already referred to the fact that the National Prohibition Act did not attempt to define the limits of its application.

It has also been shown that from October 28, 1919, when the National Prohibition Act went into effect, up until the present time, it has been a matter of general knowledge that vessels of the United States have had on board intoxicating liquors as part of their sea stores which they sold on the high seas with the approval and under the authority of the United States Treasury decisions and regulations.

Bearing this in mind, the significance of the Act passed by Congress on November 23, 1921, known as *An Act Supplemental to the National Prohibition Act*, becomes immediately apparent, for that Act defines the limits of the application of the National Prohibition Act.

Section 3 of that Act reads as follows:

“Section 3 (Territory affected by National Prohibition Act — Hawaii-Virgin Islands-Courts.) That this Act and the National Prohibition Act shall apply not only to the United States but to all territory subject to its jurisdiction, including the territory of Hawaii and the Virgin Islands; and jurisdiction is conferred on the Courts of the Territory of Hawaii and the Virgin Islands to enforce this Act and the National Prohibition Act in such territory and islands.”

There is not one word in this supplemental Act which attempts to apply the National Prohibition Act to vessels of the United States.

In fact, it appears from Section 5 of the Act, that it was contemplated that distilled spirits might be in the possession of a common carrier subject to the Transportation Act of 1920 and the Merchant Marine Act, 1920, and exempted such carrier from paying a tax if the distilled spirits should be lost.

Congress as part of the Government at that time also knew that it was the practice of vessels of the United States with express Treasury sanction to have on board wines, distilled spirits and other intoxicating liquors as sea stores and to sell them to passengers on the high seas and in foreign ports, yet, there was not any attempt on the part of Congress to extend either the National Prohibition Act or the Act in question to vessels of the United States.

It is submitted, that it is obvious from an examination of Section 3, above referred to, that the word "territory" as used in the Eighteenth Amendment and the Act of November 23, 1921, meant, and that Congress considered it to mean *lands*, and not *things on the high seas*.

The only descriptive words in the National Prohibition Act which by any possible construction could refer to ships navigating the high seas, on which such purported violations of the Act could occur, are the words "boats" and "water craft", which appear in Section 3,

Title I, Sections 21, 22 and 26, Title II. The words "boats" and "water craft" are not words which are ordinarily and customarily used to designate ships capable of navigating the high seas, but are descriptive of small water craft. The nuisances referred to in the statute are such as might well be maintained upon such craft within the limits of the United States and the organized territories. District Judge Smith in *The Saxon*, 269 Fed. 639, regarded this phraseology of the Act as indicative of the character of the vessels which came within its scope. Said Judge Smith:

"The words used as applicable to the means of transportation by water are 'water craft' and 'boat'. Ordinarily the term 'boat' and the term 'craft' are applied to water transporting conveyances of small character. As a rule, the word 'boat' is used somewhat in contradiction to the word 'vessel'—'vessel' being a boat of larger size, generally one fitted to navigate the high seas; while 'boat' as a rule was applied to an undecked, small, open vessel.

"Anterior to the application of propulsion to small boats by means of gasoline, so as to bring them within the class of self-propelled vessels, the word 'boat' was usually applied to small, open vessels only, propelled by oars in the hands of oarsmen; although poetically, and otherwise, the term 'boat' may be sometimes applied to a vessel of any size. The word 'water craft' or the term 'craft' as usually used, was applied to small vessels generally engaged in coastwise or domestic navigation. For larger vessels, as used in the present day, especially, in the case of large iron steamships, the terms 'steamer', 'steamship', or 'vessel' are generally used."

It is again urged that it is reasonably to be presumed that Congress, when framing the enforcement act, was using words in their ordinary meaning.

In all the statutes of the United States, moreover, which contain provisions governing the navigation of vessels of the United States upon the high seas, or other provisions applicable thereto, including particularly the statutes defining crimes on the high seas, the descriptive words used are "*vessels of the United States.*" If, therefore, it was the intention of Congress that the provisions of the National Prohibition Act should apply to vessels of the United States, consistency with a practice which has been uniform from the adoption of the Constitution would have dictated the use of the word "vessels", and not "boats" and "water craft" in describing such vessels. Cf. 4131 Revised Statutes, defining "vessels of the United States".

In this state of law, we submit that the National Prohibition Act cannot either by its terms or by any fair interpretation, be made applicable to acts or things without the territorial limits of the United States and its organized territories and that consequently the vessels of the United States should be held entitled to sell intoxicating liquors on the high seas and in foreign ports.

## THIRD POINT.

THE UNNECESSARY ADOPTION OF A FICTION IN CONSTITUTIONAL CONSTRUCTION THAT WOULD ATTRIBUTE TO THE WORD "TERRITORY" AS USED IN THE EIGHTEENTH AMENDMENT A MEANING WHICH WOULD INCLUDE VESSELS OF THE UNITED STATES UPON THE HIGH SEAS AND IN FOREIGN PORTS, WOULD LEAD TO EMBARRASSING INTERNATIONAL SITUATIONS.

That vessels of the United States are not territorial in an actual sense clearly appears from a consideration of the rights acknowledged in international law, and even in the municipal law, with regard to them. If they were actually territorial, they would be immune from the assertion of certain rights that may now be clearly raised against them. For instance, political refugees may be removed from them when they are in foreign ports, for there is no right of asylum on merchant passenger vessels for such purposes. *II Moore's International Law Digest*, 855, 858. They are subject to the jurisdiction of local authorities in foreign waters for the punishment of crimes committed on board in such waters. *Idem* 859; *Wildenhus Case*, 120 U. S. 1. Neutral merchant ships may be visited and searched upon the high seas, and seized and condemned by belligerents for carrying contraband of war. They may be seized, attached and sold under process *in rem* for claims in tort, or for debt, in our own or in a foreign country.

Furthermore this Court has recently held that a contract for the sale of a ship is governed by the law of the place where the contract is made and not by the law of



the ship's flag. *Gaston, Williams & Wigmore S. S. Corp. v. Warner*, decided November 23, 1922, not yet reported.

In fact the fiction of the constructive territoriality of ships has generally been disregarded by this Court whenever any substantial rights were involved.

*Foppiano vs. Speed*, 190 U. S. 501.

*Scharrenberg vs. United States*, 245 U. S. 122.

*Gaston, Williams & Wigmore SS. Corp. vs.*

*Warner*, Supreme Court, Nov. 23, 1922 not yet reported.

In *Foppiano vs. Speed*, *supra*, a ferryboat was owned by an Arkansas corporation and her owner was compelled to pay for a license to sell liquors on the ferryboat while in the City of Memphis, Tennessee. Among other arguments advanced for not paying the tax, the owner of the ferryboat contended that the ferryboat was part of the territory of Arkansas and therefore the State of Tennessee did not have any right to tax the sale of intoxicating liquors made while the boat was within the boundaries of the latter state.

The Court held that the tax was legal.

At p. 520, this Court said:

“Here, however, there is no taxation of any property whatever, either of the boat or the plaintiff in error. He is simply called upon to pay a tax for the privilege of doing the business in which he was engaged—that is, retailing of intoxicating liquors at the bar of the ferryboat while that boat was within the jurisdiction of the State of Tennessee. The fact that he was so engaged within

the actual territory of that State cannot be blotted out in such a case as this by any **fiction** suggested by the counsel for the plaintiff in error."

If this Government were to adopt, and introduce into its constitutional law, a doctrine of construction which would assert that vessels of the United States upon the high seas and in foreign ports are part of the territory of the United States, it would establish a principle which would unquestionably lead to international complications, and would result in a denial of practically all the foregoing rights. Particularly would such a doctrine embarrass the United States in any future assertion of her right of visitation and search upon neutral vessels on the high seas in the event of war. For such right is fundamentally opposed to the theory of territoriality as applied to ships.

Trade is international, and the application to it of a principle of purely domestic regulation, such as is embodied in the Eighteenth Amendment, will involve us in controversy with the other nations the moment the United States asserts the doctrine upon which those seeking to extend the Eighteenth Amendment to the high seas, necessarily ground their contention. The danger of this fiction has been clearly pointed out by W. E. Hall in his *Treatise on International Law*, at page 263:

"International law indeed as laid down by these writers themselves is inconsistent with the principle which they uphold. It is admitted by the most thorough-going assertors of the territoriality of merchant vessels that so soon as the latter enter the ports of a foreign state they become subject to

the local jurisdiction on all points in which the interests of the country are touched; that when a vessel or some one on board has infringed the local laws she can be pursued into the open seas, and can be brought back, or the culprit can be arrested there; that in time of war a merchant ship can be seized and condemned for carriage of contraband or breach of blockade. Now it was long ago pointed out that if a merchant vessel is part of the territory of her state she must always be part of it. (Manning, 276.) The fiction is meaningless unless it conveys that a merchant ship is clothed with the characteristic attributes of territory, and among these are inviolability at all times and under all circumstances short of a pressing necessity of self-preservation on the part of another power than that to which the territory belongs, and exclusiveness of jurisdiction except in so far as it is abated by the custom of extraterritoriality, which, of course, cannot be brought into use as against a ship. This however the fiction does not convey. Under the confessed practice of nations the alleged territorial character disappears whenever foreign states have strong motives for ignoring it. It cannot be seriously argued that a new and arbitrary principle has been admitted into law so long as a large part of universally accepted practice is incompatible with it, and while at the same time its legal character is denied both by important states and by jurists of weight."

This doctrine is essentially metaphorical in character, *Scharrenberg v. Dollar Steamship Company, Supra*, and now to advance it as a principle of legal right when unnecessary to the maintenance of any national right in our

international relations, would be a most unfortunate departure from accepted principles of international law.

Merchant ships at sea, or elsewhere outside the territorial limits of the country to which they belong, are not recognized, either in international law or in municipal law, as actual parts of the national territory, and they do not possess, at such times, the essential attributes or qualities of actual territory. Neither judicial authority, nor the opinion of writers on International law, nor the dictates of reason can justify the claim that ships are territory in any real sense; and if they are not territory in a real sense they cannot fall within the scope of the prohibition which is provided for "the United States and all *territory* subject to the jurisdiction thereof."

Judge Hand's decision below was put flatly on the ground that vessels of the United States are part of the territory of the United States. He disregarded entirely the decision of this court in *Scharrenberg vs. Dollar Steamship Co.*, 245 U. S. 122, and, by inference, extended the 18th Amendment to the Constitution to American vessels notwithstanding this Court's decision in *In Re Ross*, 140 U. S. 453, holding that the Constitution itself does not apply to an American vessel at sea or in foreign ports.

In a word he stretched the fiction of constructive territoriality of ships to the point of making the Constitution applicable where it had hitherto been held not to apply in order to avoid what he considered would be the inconsistency of allowing the use of intoxicating liquors on vessels of the United States when intoxicating liquors are prohibited on the land of the United States.

## FOURTH POINT.

NEITHER THE HISTORY NOR PURPOSE OF THE EIGHTEENTH AMENDMENT AND ITS ENFORCEMENT ACTS INDICATE ANY INTENTION ON THE PART OF CONGRESS TO EXTEND PROHIBITION TO VESSELS OF THE UNITED STATES WHILE ON THE HIGH SEAS OR IN FOREIGN PORTS.

1. *A careful study of the debates of Congress in connection with the Eighteenth Amendment and the two Acts in question, has failed to disclose a single word which would indicate in any way that anyone in Congress ever contemplated that prohibition would apply to vessels of the United States.*

We have already shown that the Eighteenth Amendment, the National Prohibition Act and the Supplemental Act of November 23, 1921, do not contain any reference indicating an intention to extend the enforcement of the Amendment to vessels of the United States.

The silence of these Acts is especially significant in view of the Act of February 14, 1917, known as the Alaska Prohibition Law. That Act was intended to apply to vessels and it so expressly provided.

Section 29 of the Alaska Act, which was passed more than a year before the National Prohibition Act, provides as follows (*italics ours*):

“That any person, company or corporation, who shall import or carry liquors into or upon the territorial waters of Alaska, *in or upon any steamer, steamboat, vessel, boat or other craft, or*

shall permit the same to be so imported or *carried into or upon said waters*, except under the provisions of this Act, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in section 1 of this Act."

If, therefore, Congress had intended the National Prohibition Act or the Act of November 23, 1921, to apply to vessels of the United States, it is reasonable to conclude that it would have inserted a provision similar to that which it had inserted in the Alaska Prohibition Law—a law which **had been** passed only a year before the National Prohibition Act.

The general statutes of the United States have been held not to apply to the internal affairs of a vessel.

*Brown v. Duchesne*, 19 How. 183.

*Taylor v. United States*, 207 U. S. 120.

*Scharrenberg v. Dollar SS. Co.*, 245 U. S. 122.

*United States vs. Innes*, 218 Fed. 705.

The only exception to the rule above stated is in the case of statutes which are not dependent on locality for the Government's jurisdiction and which are enacted to protect the Government against obstruction or fraud where it appears that the obstruction or fraud which the statute is aimed at may largely take place on board ships or in foreign ports.

*United States vs. Bowman*, U. S. Supreme Court, November 13, 1922, not yet reported.

In *United States vs. Bowman*, this Court reviewed and reversed the ruling of the District Court for the South-

ern District of New York, sustaining a demurrer to an indictment under section 35 of the Criminal Code, charging a conspiracy outside the United States to defraud a corporation in which the United States was a stockholder.

Mr. Chief Justice Taft, writing for the Court, said (*italics ours*):

“We have in this case a question of statutory construction. The necessary *locus*, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the Government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. We have an example of this in the attempted application of the prohibitions of the anti-trust law to acts done by citizens of the United States against other such citizens in a foreign country. *American Banana Company vs. The United Fruit Company*, 213 U. S. 347. That was a civil case, but as the statute is criminal as well as civil, it presents an analogy.”

“*But the same rule of interpretation should not be applied to criminal statutes which are, as a*

class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstructions, or fraud, wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense. Many of these occur in Chapter 4, which bears the title 'Offenses against the operation of the Government'. Section 70 of that Chapter punishes whoever as consul knowingly certifies a false invoice. Clearly the *locus* of this crime as intended by Congress is in a foreign country and certainly the foreign country in which he discharges his official duty could not object to the trial in a United States Court of a United States Consul for crime of this sort committed within its borders. Forging or altering ship's papers is made a crime by Section 72 of Chapter 4. It would be going too far to say that because Congress does not fix any *locus* it intended to exclude the high seas in respect of this crime. The natural inference from the character of the offense is that the sea would be a probable place for its commission. Section 42 of Chapter 4 punishes enticing desertions from the naval service.



Is it possible that Congress did not intend by this to include such enticing done aboard ship on the high seas or in a foreign port, where it would be most likely to be done? Section 39 punishes bribing a United States officer of the civil, military or naval service, to violate his duty or to aid in committing a fraud on the United States. It is hardly reasonable to construe this not to include such offenses when the bribe is offered to a consul, ambassador, an army or a naval officer in a foreign country or on the high seas, whose duties are being performed there and when his connivance at such fraud must occur there."

For upwards of three years after the passage of the National Prohibition Act, the United States Government itself placed the construction upon the Amendment and the Enforcement Acts that is here contended for by the appellant.

Great weight has always been given in this Court to the construction put on a statute by the Executive and the officers actively engaged in enforcing it. *Edwards, Lessee, v. Darby*, 12 Wheat. 206, 210; *United States v. Gilmore*, 8 Wall. 330; *Smythe v. Fiske*, 23 Wall. 374, 382; *United States v. Moore*, 95 U. S. 760, 763; *Brown v. United States*, 113 U. S., 568, 571; *United States v. Philbrick*, 120 U. S. 52, 59; *United States v. Hill*, 120 U. S. 169, 183; *Schell's Executors v. Fauché*, 138 U. S. 562, 572; *United States v. Alabama, etc. Ry.*, 142 U. S. 615, 621; *United States v. Taylor*, 207 U. S. 120, 125.

As has been previously pointed out, it was a matter of general knowledge that American passenger ships with Treasury sanction sold liquor to their passengers on the

high seas. They had always done so. And between the passage of the National Prohibition Act and the Act of November 23, 1921, they had been doing so for more than a year and a half. Nevertheless, Congress which had full knowledge of the practice referred to, passed the Act of November 23, 1921, defining the limits of the enforcement prohibition without extending it to ships.

*2. In considering whether Congress intended that vessels of the United States should be considered "territory" within the meaning of the Amendment and the Enforcement Acts, Section 20 of the National Prohibition Act is of great importance.*

After providing that it shall be unlawful to import or introduce into the Canal Zone or to manufacture, sell, give away, dispose of, transport or possess any liquor within the Canal Zone, Section 20 of the National Prohibition Act contains the following provision:

"Provided that this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad."

The only way in which liquor can be in transit through the Panama Canal is in ships.

Therefore, Congress in the very Act in question here, expressly stated that ships might carry liquor through the Panama Canal.

The Act does not limit the privilege to foreign ships, and it is not, of course, to be assumed that Congress would have thus extended such a right to foreign ships

with the intention to withhold it from our own ships in view of the fact that the Canal was built with American money.

The situation, therefore, comes down to this:

The very Congress which enacted the National Prohibition Act said that American ships might carry liquor in transit through the Panama Canal. This is merely another way of saying that vessels of the United States are not "territory" within the meaning of the Amendment and the Act because if Congress had intended a ship to be "territory" it would not have allowed them to carry liquor through the Canal. A ship cannot be "territory" on the high seas and not "territory" while passing through the Canal.

We have, therefore, an interpretation by the very Congress whose intention we are seeking, that they did not consider American ships "territory" within the meaning of the Amendment.

*3. It seems hardly conceivable that Congress would place an additional obstacle in the way of the establishment of an American Merchant Marine when the additional burden imposed was not essential to carry out the fundamental purposes of the Prohibition reform.*

There can be no question but that if the decision of the Court below is sustained here, it will be impossible commercially to operate American flag steamers in the passenger trades of the world.

In the first place, the great foreign transatlantic liners will always be able to sell liquor on their *west bound*

voyages. Against such competition the American lines will be seriously handicapped for Europeans will not travel by American steamers when they can come by foreign ships and enjoy their usual wine.

In the South American trade the foreign lines will be able to serve liquor on their northbound voyage. It will also be possible for the foreign ships on their southbound trips to stop at Bermuda or Havana and secure intoxicating liquors for the use of their passengers.

Against such competition, of course, the American lines to South America cannot live.

More serious still is the situation on the Pacific. Vancouver and Seattle are the two principal ports competing for the Far Eastern passenger trade. As foreign steamers can sail in and out of Vancouver to and from the Far East, it can be readily seen what little chance an American line will have with sailings between Seattle, for example, and the East. The result would be a great diversion of passenger business to a foreign country and foreign vessels.

If Vancouver becomes the gateway to and from the Far East, American railroads are bound to suffer a great loss in traffic.

In connection with this phase of the matter, it should also be remembered that the same Congress which enacted the National Prohibition Act, also passed the Merchant Marine Act of 1920.

This latter Act contains the following declaration of policy (*Italics ours*):

*“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels, sufficient to carry the greater portion of its commerce, and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and in so far as may not be inconsistent with the express provisions of this Act, the United States shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations and in the administration of the shipping laws, keep always in view this purpose and object as the primary end to be obtained.”*

It seems inconceivable, therefore, that Congress could have intended to extend prohibition to ships when the result of so doing would be practically to nullify the National policy of the United States with respect to shipping so far as passenger traffic is concerned.

It is submitted, that in the absence of any express provision by Congress extending prohibition to vessels of the United States, the construction which has been placed upon the Amendment and the Enforcement Acts by the Government itself, should prevail especially in view of the fact that an opposite construction would re-

sult in irreparable damage to the American Merchant Marine and, so far as passenger traffic is concerned, in the complete abrogation of the policy of the United States with respect to shipping as announced in the Merchant Marine Act of 1920.

In so far as preparation for national defense is concerned, the experience of the recent War shows that for the carriage of troops in any great numbers, an adequate fleet of passenger ships is necessary.

*4. Vessels of the United States engaged in foreign trade go to all parts of the world and are in competition with ships of foreign nations.*

They naturally meet with different conditions, peoples and customs. If they disregard the customs of the people with whom they seek to do business, it is obvious that there will soon be no business to do.

Whatever one's personal views may be on the subject of prohibition, it must be admitted that it is not possible for American passenger vessels which are dry to seek in foreign ports the patronage of subjects of those foreign nations whose customs and diet prescribe wines and other liquors.

In *Neilsen et al. vs. Rhine Shipping Company*, 248 U. S. 205, this Court had under consideration Section 11 of the Seamen's Act of 1915, Chap. 153, Stat. 1164, which prohibited advance payment of wages to seamen. The Court held that the statute was not to be construed in such a way as to prohibit advance payment of wages when made by American vessels to secure seamen in foreign ports.

At p. 213 the Court said:

“It appears that only by compliance with the local custom of obtaining seamen through agents can American vessels obtain seamen in South American ports. This is greatly to be deplored, and the custom is one which works much hardship to a worthy class. But we are unable to discover that in passing this statute Congress intended to place American shipping at the great disadvantage of this inability to obtain seamen when compared with the vessels of other nations which are manned by complying with local usage.”

The remarks of this Court in connection with the securing of crews in foreign ports, apply with equal force to the securing of passengers abroad.

This is the negative side of the matter.

The positive side is more perplexing still. Vessels of the United States will not be permitted by the laws of certain foreign nations, to leave their jurisdiction without having the usual wine on board for the use of passengers during the voyage.

The appellant in this case maintains a service between Antwerp and New York. Under the Belgian law no vessel is permitted to clear or leave a Belgian port unless it has on board, as part of its sea stores, a certain amount of intoxicating liquors for the use of the passengers during the voyage. If the decision of the Court below is sustained, it may be that the Kingdom of Belgium, through diplomatic exchanges, may be persuaded

to repeal this law but it is also possible and more probable that the Kingdom of Belgium will not agree.

In the latter event, appellant's vessels are likely to be given a choice between being tied up more or less permanently in Belgium, or breaking laws of their own country.

In any event, there will be no less liquor on the high seas because foreign ships will be able to comply with the Belgian law.

The only result, as a practical matter, will be to prevent American ships from engaging in the Antwerp-New York passenger trade.

The laws of Italy require a wine ration for passengers on westbound voyages. If American ships cannot comply with these laws, they must of necessity withdraw from this trade.

The more one looks at the entire situation, the more it is brought home that Congress did not and could not have intended to extend the prohibition to vessels of the United States while on the high seas and in foreign ports.

By the general law of nations, American vessels will be obliged to comply with the laws of foreign nations while in foreign ports. *Neilson vs. Rhine Shipping Co.*, 248 U. S. 205.

In that case, at p. 209, Mr. Justice Day said:

“The very fact that our law applies to foreign vessels while in our ports is one of the strongest arguments why it should be held not to apply to our vessels while in foreign ports. In other



words, we should recognize the law of foreign countries with respect to our vessels in their ports, just as we expect foreign countries to recognize our law with respect to their vessels in our ports. This but accords with the general doctrine that when a merchant vessel of one country enters a port of another for the purposes of trade it subjects itself to the law of the place to which it goes. *Wildenhus' Case*, 120 U. S. 1, 11. The contracts between the ship and the seamen as well as the advances were made on shore at Buenos Ayres. 'The general and almost universal rule is that the character of the acts as lawful or unlawful must be determined wholly by the law of the country where the act is done.' *American Banana Co. vs. United Fruit Co.*, 213 U. S. 347, 356."

5. *The construction of the Amendment and the Enforcement Acts here contended for would not constitute an interference or limitation upon what everyone realizes is a great national reform.*

The liquor, which is the subject of this controversy, has already been shown to be a part of the sea stores of the vessels, intended for use upon the high seas and in foreign ports. None of it is manufactured, sold or transported within the territorial limits of the United States and none of it is imported into or exported from the United States.

In short, the liquor which as sea stores has become embodied in the ship, never leaves the ship but is consumed wholly upon the high seas or in foreign ports.

The present laws and regulations of the Treasury Department permit a ship only to have a reasonable amount of liquor on board as part of her sea stores.

Serious penalties are provided if any of the liquor is introduced into the country.

It is to the interest of this appellant and other American shipowners to see that these regulations are obeyed to the letter.

The only way in which any intoxicating liquors can, under the regulations of the Treasury Department, be introduced into this country or consumed while an American vessel is in the territorial waters of the United States, is by criminal action and this necessitates the breaking of Treasury seals which can be readily detected.

This Court will, perhaps, take judicial notice that there exists today a large body of persons, commonly referred to in the vernacular as "bootleggers" who will, and do take any means available to procure and sell liquor contrary to law.

If the decision of the Court below is sustained, steamship owners believe that a majority of the stewards and other minor employes of American vessels will become bootleggers. It is lawful to purchase liquor in foreign ports. To smuggle it on board a ship and hide it there would be easy and practically impossible of detection.

Stewards and other minor employees of American ships, tempted by large gains, would undoubtedly have available a sufficient supply of liquor for any of the passengers who might wish it.

In any event, the crews of American vessels, so soon as a ship touched at a foreign port, can reasonably be expected to stock up with whatever they may wish, at least for their own consumption.

As a practical matter, therefore, it is submitted that the practice of using intoxicating liquors would not be prevented by the contention made for the Government as to the scope of the Amendment and the Acts, and instead of an orderly efficient and lawful method of handling the liquors by responsible owners, the business would be carried on illegally by the crews.

So far as control over individual travellers is concerned, even if it were possible completely to stop the use of intoxicating liquors on American vessels, the most that could be accomplished would be that a traveller going to Europe would be prevented from taking intoxicants from five to seven days earlier than otherwise.

There would be no effect whatsoever on passengers coming from Europe to this country because such persons could and would travel by foreign lines.

To sum up, an affirmance of the decision of the Court below would result in the gradual elimination of the American flag from passenger trade on the high seas, and in more or less illegal dealing with liquors by the crew. On the other hand, the actual prevention of the use of intoxicating liquors would not be advanced because those wishing intoxicants could travel by foreign lines.

It is submitted, therefore, that the construction here contended for which would permit American ships to sell liquor on the high seas and in foreign ports, does not in any way affect the fundamental reform enacted in the Amendment by the Congress.

Congress did not state in the Amendment or in the Enforcement Acts that the Amendment or the Acts extended to vessels of the United States on the high seas or in foreign ports.

Prohibition should not be extended by implication when Congress has the power to legislate expressly under the Commerce Clause but has not done so and when to do so would involve the Merchant Marine of the United States in the international embarrassments above indicated.

#### LAST POINT.

THE DECREE OF THE COURT BELOW SHOULD BE REVERSED  
AND A PERMANENT INJUNCTION GRANTED AS PRAYED.

Respectfully submitted,

JOHN M. WOOLSEY  
CLETUS KEATING  
J. PARKER KIRLIN  
IRA A. CAMPBELL,  
Counsel for Appellant.

December, 1922.



# Supplement to the Report of the

Commission on the

UNITED STATES DEPARTMENT OF AGRICULTURE

WASHINGTON

1911

RECORDS OF THE COMMISSION

OF THE UNITED STATES

1911

UNITED STATES DEPARTMENT OF AGRICULTURE

WASHINGTON

1911

HENRY C. BROWN, Secretary of Agriculture

and Chief of the Bureau of Entomology

1911

SECTION TO ADVANCE

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IN THE  
SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM, 1922.

INTERNATIONAL MERCANTILE MARINE  
COMPANY,  
Appellant,  
*against*

No. 693.

H. C. STUART, Acting Collector of the  
Port of New York, *et al.*,  
Appellees.

2

UNITED AMERICAN LINES, INCORPORATED, *et al.*,  
Appellants,

*against*

No. 694.

HENRY C. STUART, Acting Collector of  
Customs for the Port of New  
York, *et al.*,  
Appellees.

3

*Sir:*

PLEASE TAKE NOTICE that on Monday, November 13th, 1922, at 12 o'clock noon, or as soon thereafter as counsel may be heard, the appellants herein will submit to the Supreme Court of the United States a motion, a copy of

- 4 which is hereto annexed, petitioning said Court to advance the above entitled causes for early hearing.

Dated, November 1, 1922.

CLETUS KEATING,  
REID L. CARE,  
Counsel for Appellants.

To:

HON. HARRY M. DAUGHERTY,  
Attorney General of the United States,  
Counsel for Appellees.

5

6



IN THE  
SUPREME COURT OF THE UNITED STATES,

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Customs for the Port of New  
York, *et al.*,

Appellees.

9

*On Appeal from the District Court of the United States  
for the Southern District of New York:*

The appellants move that these causes be advanced  
for hearing at an early date.

I.—These appeals are taken from final decrees of the  
District Court of the United States for the Southern

- 10 District of New York in each case dismissing the bill of complaint.

II.—The decision of the District Court from which these appeals are taken affects all American vessels in American territorial waters, on the high seas and in foreign ports.

- 11 III.—The bills of complaint prayed for an injunction restraining the defendants from enforcing or attempting to enforce against the complainants or their vessels any of the forfeitures or penalties provided for in the National Prohibition Act by reason of the carriage by their vessels within the territorial waters of the United States of intoxicating liquors kept on board their vessels as sea stores and intended for the use of the passengers and crews of the said vessels outside the territorial waters of the United States, and also by reason of any sales of liquor carried as sea stores which may be made on the high seas or in foreign ports on said vessels.

- 12 IV.—The complainants-appellants are corporations incorporated in the United States, and the vessels owned by them fly the flag of the United States, and are owned and registered within the United States.

The bills of complaint were filed to restrain the threatened acts of the defendants, to make and carry out orders following an opinion of the Attorney General of the United States which held that American vessels were violating the provisions of the Eighteenth Amendment and the National Prohibition Act by keeping on board while in the territorial waters of the United States in-

13  
toxicating liquors in the sea stores of said vessels which were intended for the use by passengers and crews of the vessels outside the territorial waters of the United States.

The ruling of the Attorney General above referred to is contrary to the opinion of a previous Attorney General and to the existing regulations promulgated by the Secretary of the Treasury.

V.—The necessary jurisdictional facts appear in the bills of complaint.

14  
VI.—Due notice of the presentation of this motion has been given to the Attorney General of the United States, counsel for the appellees.

VII.—An early hearing of this appeal is, in the opinion of counsel for the appellants, desirable in the public interest as well as in the interest of the complainants-appellants themselves, and all other American steamship lines similarly situated.

CLETUS KEATING,  
REID L. CARR,  
15  
Counsel for Appellants.

U. S. Supreme Court,  
**FILED**

**DEC 29 1922**

**WM. R. STANSBURY**

**CLE**

IN THE  
**Supreme Court of the United States,**

**OCTOBER TERM, 1922.**

**No. 694.**

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**UNITED AMERICAN LINES, et al.,**

*Appellants,*

*v.*

**HENRY C. STUART, ETC., et al.,**

*Appellees.*

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.**

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**BRIEF FOR APPELLANTS.**

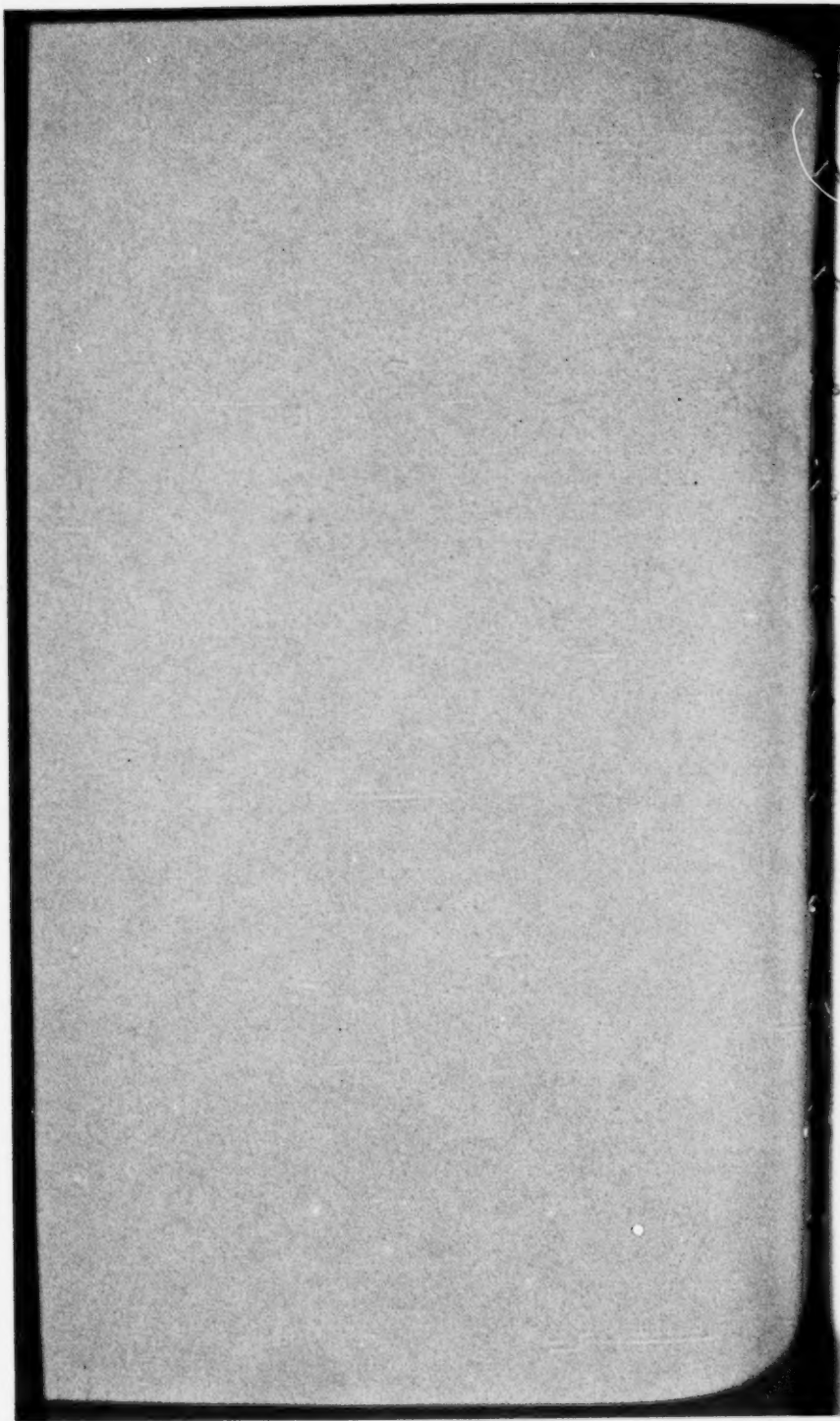
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**REID L. CARR,**

*Attorney for Appellants.*

**GEORGE ADAMS ELLIS,  
FREDERICK H. STOKES,**

*Of Counsel.*



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IN THE  
**Supreme Court of the United States,**  
OCTOBER TERM, 1922.

UNITED AMERICAN LINES, *et al.*,  
Appellants,

AGAINST

HENRY C. STUART, etc., *et al.*,  
Appellees.

No. 694.

BRIEF OF UNITED AMERICAN LINES, *et al.*,  
APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal under section two hundred and thirty-eight of the Judicial Code from a final decree of the District Court of the United States for the Southern District of New York, denying appellants' motion for an injunction and dismissing the amended bill (p. 7).

The appellants in this case are affiliated corporations engaged in the ownership and operation of five passenger steamships of American registry.

The allegations of fact, omitting jurisdictional averments, are in brief:

The ships owned and operated by appellants maintain regular sailings between New York and Plymouth, Boulogne, Southampton, Cherbourg and Hamburg (p. 25).

All of these vessels have been accustomed while within the port of New York to keep on board as part of their sea-stores, pursuant to regulations issued by the Treasury Department of the United States, intoxicating beverages for sale to their passengers upon the high seas (p. 26).

The Attorney General of the United States on October 5, 1922, ruled that this practice, hitherto sanctioned by the Treasury Department, is illegal, and further ruled that ships of American registry, wherever they may be, are subject to the Eighteenth Amendment and to the National Prohibition Act (p. 26).

Accordingly, appellees threaten to confiscate the stock of liquors now on board the ships as sea-stores, and if appellants hereafter carry or sell any intoxicating beverages on their ships, whether upon the high seas or in foreign ports, to subject the appellants to criminal prosecution and to seize and forfeit the vessel on which they are carried or sold (p. 23).

If the liquors are confiscated and appellants are prevented from selling such beverages to passengers everywhere in the world, they will suffer

irreparable damage through diversion of passenger traffic to foreign lines (p. 27).

The bill prays for an injunction restraining the appellees from seizing the liquors or attempting to enforce any penalty or forfeiture by reason of the sale of intoxicating beverages by appellants to passengers upon the high seas or in foreign ports (p. 27), and for general relief (p. 28).

The answer admits the averments of fact contained in the amended bill, including the allegation of irreparable damage (pp. 21-22).

As matter of law, the appellants assert two rights.

1. The right to dispense intoxicating beverages to passengers upon the high seas and in foreign ports, independently of the question whether these may be lawfully brought within the three mile limit.

2. The incidental right to keep such beverages in reasonable quantity as sea-stores on board their ships, under the regulations of the Treasury Department, while within the ports and harbors of the United States.

These rights they could not assert except in this suit, without incurring the risk of forfeiture of their property as well as criminal prosecution.

As the incidental right to bring intoxicants into port as sea-stores is fully discussed in the other cases argued simultaneously with this, no argument on that point will be made in this brief.

## ARGUMENT.

## I.

THE TERRITORIAL SCOPE OF THE AMENDMENT  
AND PROHIBITION ACTS.

The scope of the Eighteenth Amendment is declared in its first section to be "the United States and all territory subject to the jurisdiction thereof."

The Amendment was not self-executing but required enforcing legislation.

Such legislation was authorized by the second section, as to which this Court said in the *National Prohibition Cases* (253 U. S. 350, 387):

"The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section."

It follows that the liability of the property of the appellants to seizure or forfeiture depends, not merely upon the Amendment, since that provides no penalties or sanctions, but also upon the enforcing legislation enacted by Congress. Hence both must be considered.

The original National Prohibition Act (41 Stat. 305) contains no general provision defining the limits within which it shall be operative.

However, it does specifically provide in section twenty of title three:

"That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt, or spirituous liquors. . . . *Provided*, That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad."

The exception thus established for the Panama Canal will hereafter be specially referred to as indicative of Congressional intent.

By section three of the supplemental Act of November 23, 1921 (42 Stat. 222), it was provided:

"This Act and the National Prohibition Act shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; and jurisdiction is conferred on the courts of the Territory of Hawaii and the Virgin Islands to enforce this Act and the National Prohibition Act in such Territory and Islands."

The territorial character of the National Prohibition Act is thus affirmed in virtually the same phraseology employed in the Eighteenth Amend-



ment, with the added words "including the Territory of Hawaii and the Virgin Islands."

Neither the Amendment nor the enforcing legislation mentions the sale of intoxicating beverages upon the high seas or in foreign waters or ports, or upon American ships while in those seas, waters or ports.

This omission the appellees seek to supply by construction or implication from the word "territory" as used in the Amendment and the Act of November 23, 1921. Their theory is that a vessel of American registry is territory subject to the jurisdiction of the United States. Upon that proposition both the opinion of the Attorney General and the decision of the District Court squarely rest.

## II.

THE WORD TERRITORY AS EMPLOYED IN THE EIGHTEENTH AMENDMENT MUST BE CONSTRUED ACCORDING TO THE MEANING FIXED UPON IT IN OUR CONSTITUTIONAL HISTORY.

It is of course a cardinal rule of constitutional construction that words are presumed to have been used according to their plain, natural and usual signification and import, and not in a figurative or metaphorical sense (*Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat, 419; *Holmes v. Jennison*, 14 Pet. 540).

The framers of the Amendment, as Chief Justice Marshall tersely said in *Gibbons v. Ogden* (9 Wheat. 1), "must be understood to have employed words in their natural sense, and to have intended what they have said."

Or as was stated in *Tennessee v. Whitworth* (117 U. S. 139, 147):

"Words in a constitution, as well as words in a statute, are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary."

It is also a truism that if the words used in a constitutional provision have acquired under our institutions a technical legal meaning, such words are to be taken in that sense (*Calder v. Bull*, 3 Dall. 386; *Thompson v. Utah*, 170 U. S. 343, 350). "The technical sense in these cases is the sense popularly understood, because that is the sense fixed upon the words in legal and constitutional history where they have been employed" (Cooley, *Const. Lim.*, page 94).

Thus in *McPherson v. Blacker* (146 U. S. 1, 27), these familiar rules were applied in determining the legal meaning of the word "State", appearing in the clauses of the Constitution relating to presidential electors.

The word "territory", as its derivation shows, in its primary sense denotes land. It describes a district or country. The territory of a jurisdic-

tion or country extends to its boundaries (*The Danube*, 55 Fed. 993, 995).

Bouvier's Law Dictionary defines it as follows:

"A part of a country separate from the rest and subject to a particular jurisdiction."

One of the definitions given by Webster is:

"Any area or tract of a state not invested with full rights of sovereignty, but governed or ruled as a dependency or subject area, or having a legal system more or less peculiar to itself."

In the Eighteenth Amendment the word is used not alone, but in conjunction with and in contradistinction to "the United States". The language is "the United States and all territory subject to the jurisdiction thereof."

Within the limits of the United States, concurrent power of enforcement is granted to Congress and to "the several States." In territory not admitted to statehood, and therefore still in a "subject" condition, the power of Congress is of course plenary and exclusive.

As here employed, the word long ago acquired under our political institutions "a distinctive, fixed and legal meaning" (*Ex parte Morgan*, 20 Fed. 298, 304).

It denotes land acquired by the United States through discovery, cession or conquest, but not included in any State nor admitted to the Union.

In this sense its use antedates the Constitution.

In 1780 the State of New York delimited its western boundary, and ceded to the United States the "territory" to the west thereof. Similar cessions of "territory" were made by Virginia in 1784, by Massachusetts in 1785, and by Connecticut and South Carolina in 1787. The Continental Congress in 1780 resolved that "demesne or territorial lands shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states." This was followed by the ordinance of 1784 for the government of the territory ceded to the United States, which was superseded by the famous ordinance of 1787 "for the government of the territory of the United States northwest of the river Ohio."

Then came the Constitution, providing in its territorial clause (section three of Article four) that:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The word "territory", here occurring for the only time in the original text of the Constitution, was construed by this Court in *United States v. Gratiot* (14 Pet. 526, 537) thus:

"The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands."

The words quoted are not, as the District Court seems to have thought, "a chance phrase".

On the contrary, the territorial clause of the Constitution has always been construed as referring to land subject to the dominion of the United States but neither constituting nor included in a State, in decisions too numerous and too well known for exhaustive citation.

Among the decisions are *Sere v. Pitot*, 6 Cr. 332, 336; *American Insurance Co. v. Canter*, 1 Peters, 511, 541; *Johnson v. McIntosh*, 8 Wheat. 543, 595; *Benner v. Porter*, 9 How. 235, 242; *National Bank v. Yankton*, 101 U. S. 129, 133; *Mormon Church v. United States*, 136 U. S. 1; *Doxnes v. Bidwell*, 182 U. S. 244; *Dorr v. United States*, 195 U. S. 138; *People v. Bingham*, 211 U. S. 468.

The authorities are copiously cited and reviewed in the learned opinions written by the several members of this Court in *Doxnes v. Bidwell* (182 U. S. 244).

From this body of accumulated precedent, both legislative and judicial, arises the elementary legal concept of "territory subject to the jurisdiction" of the United States.

1. It is land over which dominion or sovereignty has been acquired by discovery, cession, annexation or conquest.

2. While neither constituting nor included in a state, it is capable of admission to statehood in the discretion of Congress.

3. It may be, and usually is, vested in varying degree with the power of local self-government, including such authority to legislate concerning the conduct of its inhabitants as Congress may sanction. If granted legislative power, it is termed "organized territory", the determining feature being a local legislature as distinguished from a more rudimentary and less autonomous form of government (*Int. Com. Com. v. Humboldt*, 224 U. S. 474, 480).

Of course none of these attributes is possessed by a ship which is neither territory in a physical sense, nor in the sense in which the word is employed in the Constitution.

It has never been supposed that the territorial clause of the Constitution (Article four, section three) was the source of the power of Congress to enact laws relating to merchant vessels of the United States, or to the punishment of crimes thereon.

The power of Congress to legislate on these subjects has been always derived, according to the particular matter involved, from the commerce clause, the clause relating to admiralty and maritime jurisdiction, or the clause conferring power to define and punish felonies upon the high seas

(*United States v. Coombs*, 12 Pet. 72, 78; *United States v. Cole*, 5 McLean, 518; *The Lottawanna*, 21 Wall. 558, 580; *White's Bank v. Smith*, 7 Wall. 646).

It may also be observed that both in general legislation and in particular acts relating to navigation and foreign commerce, extending over more than a century, Congress has sedulously distinguished between "ships" and "territory" (1 Stat. 565; 2 Stat. 426; 2 Stat. 529; 3 Stat. 370; 3 Stat. 447; 3 Stat. 488; 3 Stat. 616; 10 Stat. 719; 32 Stat. 172).

### III.

A SHIP IS NOT TERRITORY WITHIN THE MEANING OF THE EIGHTEENTH AMENDMENT OR THE ENFORCING LEGISLATION.

It is true that a ship is sometimes in fanciful or figurative language called part of the territory of the nation whose flag it flies. But that is a metaphor or analogy rather than a legal definition. And the books are replete with illustrations of its imperfect or misleading character, and with warnings against making it the foundation of a legal argument.

The doctrine of the so-called territoriality of ships is not a conception of the common law. It does not appear that it can be traced further back

than to the "Exposition des Motifs" put forth in 1752 by the Prussian Government to justify its behavior in confiscating funds payable to English creditors. In that document, it is said that "the Prussian vessels, although laden with property belonging to the enemies of England, were a neutral place, whence it follows that it is exactly the same thing to have taken such property out of the said vessels as to have taken it upon neutral territory" (De Martens Causes Cél. ii, 117).

"In its origin, therefore," says Hall in his treatise on International Law (p. 260), "the doctrine had just so much authority as belongs to a legal proposition laid down by an advocate whose law is notoriously bad. A few years later the idea reappears in Vattel, but he uses it only incidentally to explain a particular custom, and evidently without adequate consideration of its scope and bearings."

While judges and text writers have in certain cases invoked it by way of illustration or analogy, it is not of general application, such as would justify reading it into the words of the Constitution of the United States.

The remarks of Mr. Justice Lindley in *The Queen v. Keyn* (L. R. 2 Exch. Div. 63, 93-94) are apposite:

"This contention renders it necessary to investigate the doctrine that a merchant ship



is part of the territory of the country whose flag she bears.

It is obvious that she is not so in point of fact; and it is easy to show that the doctrine holds good to a very limited extent indeed.

First, it is admitted that a foreign merchant ship, which enters the ports, harbours, or rivers of England, becomes subject to English law, her so-called territoriality does not in that case exclude the operation of English law.

Secondly. It is conceded that, even in time of peace, the territoriality of a foreign merchant ship, within three miles of the coast of any state, does not exempt that ship or its crew from the operation of those laws of that state which relate to its revenue or fisheries.

Thirdly. In time of war the so-called territoriality of a ship of one of the belligerents does not subject it to invasion or capture within three miles of a neutral coast.

Fourthly. In time of war the so-called territoriality of a neutral merchant ship does not exempt it from invasion in search of contraband of war.

Fifthly. In time of war this country has invariably denied that the territoriality of a neutral merchant ship protected enemy's goods on board; and although England has agreed with some nations that in future free ships shall make free goods (unless contraband of war), England resolutely maintains the old doctrine against all other nations.

*In all these cases the territoriality of the ship becomes an unmeaning phrase, and care must be taken not to be misled by it, and not to allow the general assertion that a ship is part of the territory whose flag she bears to pass unchallenged, and to be made the basis of a legal argument" (italics ours).*

In *Chartered Bank v. Netherlands* (L. R. 10 Q. B. D. 521), it was contended that the liability for loss of cargo through collision on the high seas was governed by Dutch law since both vessels flew the Dutch flag. In refusing to sustain the contention, the same judge said (p. 544):

"This reason is based on a very common and fruitful source of error, viz. the error of identifying ships with portions of the territory of the States to which they belong. The analogy is imperfect and often more misleading than the reverse, as I have endeavored to point out before. In this particular case the analogy appears to me more misleading than usual. I am not aware of any decision in this country to the effect that when two ships come into collision on the high seas the rights and liabilities of the respective owners have been held to depend on the laws of the respective flags of the ships."

Westlake says (*International Law*, Part I, p. 168):

"These truths are often expressed by saying that a ship, even a merchantman, is a

floating part of the territory of her state, but that expression has the demerit of clothing in a fiction what can be conveyed with equal simplicity by stating the fact that a ship, no less than a territory, is a field of state action, state authority being present in her and on the high sea exclusive."

W. E. Hall says in his treatise on International Law (p. 263):

"International law indeed as laid down by these writers themselves is inconsistent with the principle which they uphold. It is admitted by the most thorough-going assertors of the territoriality of merchant vessels that so soon as the latter enter the ports of a foreign state they become subject to the local jurisdiction on all points in which the interests of the country are touched; that when a vessel or some one on board has infringed the local laws she can be pursued into the open seas, and can be brought back, or the culprit can be arrested there; that in time of war a merchant ship can be seized and condemned for carriage of contraband or breach of blockade. Now it was long ago pointed out that if a merchant vessel is part of the territory of her state she must always be part of it. (Manning, 276.) The fiction is meaningless unless it conveys that a merchant ship is clothed with the characteristic attributes of territory, and among these are inviolability at all times and under all cir-

cumstances short of a pressing necessity of self-preservation on the part of another power than that to which the territory belongs, and exclusiveness of jurisdiction except in so far as it is abated by the custom of extritoriality, which of course, cannot be brought into use as against a ship. This, however, the fiction does not convey. Under the confessed practice of nations the alleged territorial character disappears whenever foreign states have strong motives for ignoring it. It cannot be seriously argued that a new and arbitrary principle has been admitted into law so long as a large part of universally accepted practice is incompatible with it, and while at the same time its legal character is denied both by important states and by jurists of weight."

This Court has not hesitated to reject the view that a merchant vessel is a part of the United States, in the sense that persons on board are entitled to invoke the constitutional right of a jury trial, as long as they are outside the physical boundaries of the United States.

*In re Ross* (140 U. S. 453) was such a case. The petitioner Ross, a seaman, had committed the crime of murder on board an American merchant ship in the harbor of Yokohama. For this crime he was convicted in the American consular tribunal of Japan, without being accorded a jury trial. On *habeas corpus* he asserted that the ves-

sel on which his crime was committed was constructively a part of the United States, and that his constitutional right to a jury trial had been infringed.

This court said (p. 464) :

"By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook v. United States*, 138 U. S. 157, 181. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. *The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States*" (italics ours).

This Court has also decided that a vessel of American registry is not territory subject to the jurisdiction of the United States, within the meaning of a statute whose language was similar to, though broader than, that of the Eighteenth Amendment.

In *Scharrenberg v. Dollar Steamship Company* (245 U. S. 122), defendant was sued for penalties under the Contract Labor Law (34 Stat. 898). The alleged infraction consisted of employing a Chinese seaman under contract upon an American ship.

It should be noted that the Attorney General in his opinion dismisses this case upon the assumption that it involved only the phrases "into the United States" and "into this country". This, however, is erroneous. The statute in question provided that

"For the purpose of this Act the term 'United States' as used in the title as well as in the various sections of this Act shall be construed to mean the United States and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone" (34 Stat. 908).

It was argued, in support of the claim, that the American vessel was part of the territory of the United States.

In deciding the case, this Court was therefore required to construe the words "*United States and*

*any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone".*

It is evident that this language is broader than that of the Eighteenth Amendment, which is "the United States and all territory subject to the jurisdiction thereof."

Mr. Justice Clarke, in delivering the opinion of the Court, held at page 127:

"Equally unallowable is the contention that a ship of American registry engaged in foreign commerce is a part of the territory of the United States in such a sense that men employed on it can be said to be laboring 'in the United States' or 'performing labor in this country.' It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative (International Law Digest, Moore, vol. 1, Sec. 174), and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible. Thus the seamen employed on the 'Mackinaw' were not within either the spirit or the letter of the law on which the petitioner bases his action and in any point of view his contention is fanciful and unsound and must be denied."

See also *Foppiano v. Speed*, 199 U. S. 501; *Neilson v. Rhine*, 248 U. S. 205; *United States v. Innes*, 218 Fed. 705; *Taylor v. United States*, 207 U. S. 120; *Brozen v. Duchesne*, 19 How. 183.

The cases cited in support of the assertion that merchant vessels are territory in the constitutional sense fall far short of sustaining that proposition.

None of these cases involves the construction of the word "territory" appearing in the Constitution or in any statute.

They may be broadly divided into three classes.

1. The first class comprises criminal prosecutions under statutes *specifically providing* for the punishment of offences committed upon the high seas, or in places within the admiralty and maritime jurisdiction of the United States.

Such are *United States v. Rodgers* (150 U. S. 249); *St. Clair v. United States* (154 U. S. 134); *Wynne v. United States* (217 U. S. 234); *Miller v. United States* (242 Fed. 907); *Pedersen v. United States* (271 Fed. 187).

These statutes are founded, not on the territorial clause of the Constitution, but on the power of Congress to regulate commerce and its power to define and punish felonies upon the high seas.

Any expressions in those decisions to the effect that merchant vessels are regarded constructively as territory must be taken by way of analogy or illustration, rather than as an exposition of the



legal construction of the word "territory" occurring in the Constitution or a statute.

2. The second class includes cases of treason or fraud directly obstructing the operations of the Government itself, which may be punished wherever committed by citizens, even if perpetrated in foreign countries. Here the *locus* is immaterial.

Such are *United States v. Greathouse* (4 Sawy. 457) and *United States v. Bowman* (U. S. Sup. Ct. advance opinions November 13, 1922).

3. In the third class fall cases dealing with the extent to which the several States may legislate concerning ships as property, as regards such subjects as taxation, liens, insolvency and rights of action for torts (*People ex rel. Pac. M. S. Co. v. Commissioner of Taxes*, 58 N. Y. 242; *Crafo v. Kelly*, 16 Wall. 610; *Lindstrom v. International Navigation Co.*, 117 Fed. 170; *Wilson v. McNamee*, 102 U. S. 572; *The Hamilton (Old Dominion S. S. Co. v. Gilmore)*, 207 U. S. 402; *Martin v. West*, 222 U. S. 191).

These authorities tend rather to support than to defeat the appellants' contention.

If merchant vessels were territory of the United States in the constitutional sense, Congress would have the sole and exclusive power to legislate concerning them.

The several States would be bereft of all power, even though Congress had not acted.

But the authorities last cited uphold the validity of State statutes in cases where Congress is silent.

#### IV.

AS A MATTER OF STATUTORY CONSTRUCTION THE PROHIBITION ACTS NEGATIVE THE INTENTION OF CONGRESS TO EXTEND THEIR OPERATION TO VESSELS OF THE UNITED STATES ON THE HIGH SEAS OR IN FOREIGN PORTS.

We approach consideration of the enforcing legislation with the maxim "all legislation is *prima facie* territorial" (*American Banana Co. v. United Fruit Co.*, 213 U. S. 347).

In examining the National Prohibition Act and the Act of November 23, 1921, several points at once strike the attention.

1. Neither act contains any reference to the "high seas", such as is invariable in the definition of offences against the peace and order of the community, where it is the intention of Congress to punish such offences if committed outside the strictly territorial limits of the United States.

The omission is peculiarly significant in the supplemental Act.

At the time it was passed, ships of American registry were openly selling intoxicating bever-

ages to their passengers outside the three mile limit. They were also accustomed to bring their sea-stores of these beverages into our ports, under seal, in accordance with the regulations promulgated by the Treasury Department.

The regulations had been published and had been in operation for nearly two years. They were a matter of common knowledge.

The original regulations (Treasury Decision 38218) were issued on December 11, 1919. The amended regulations (Treasury Decision 38248) were issued on January 27, 1920.

The first sentence of the amended regulations specifically referred to American ships. It read as follows:

"All liquors which are prohibited importation but which are properly listed as *sea stores on American vessels arriving in ports of the United States* (italics ours) should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose."

It must be presumed that Congress, at the time it passed the supplemental Act, had knowledge of the construction previously placed on the National Prohibition Act by the department of the Government primarily charged with its enforcement (*Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 45).

The failure of Congress in the supplemental Act specifically to indicate its disapproval of the departmental construction indicates the adoption of such construction (*U. S. v. Cerecedo*, 209 U. S. 337; *Swigart v. Baker*, 229 U. S. 187-199; *New Haven R. R. Co. v. Interstate Com. Com.*, 200 U. S. 361).

Is it conceivable that if Congress had intended to make it a crime for American vessels to carry liquor as sea-stores for consumption by their passengers upon the high seas, it would have failed to include in the supplemental Act a specific provision referring to the high seas?

The inference thus drawn is reinforced by the recent decision of this Court in *United States v. Bowman* (decided November 13, 1922).

The opinion makes this distinction:

"Crimes against private individuals, or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. *If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard* (italics ours). We have an example of this

in the attempted application of the prohibitions of the anti-trust law to acts done by citizens of the United States against other such citizens in a foreign country. *American Banana Company v. The United Fruit Company*, 213 U. S. 347. That was a civil case, but as the statute is criminal as well as civil, it presents an analogy.

But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense."

Neither the Eighteenth Amendment nor the National Prohibition Act can properly be con-

sidered as having been adopted for the purpose of enabling the Government to defend itself against treason, fraud or obstruction, affecting its operations as a Government.

Prohibitory legislation has always been justified on the principle that it is for the protection of the individual, and of the peace and order of the community, from the evil effects of intoxicating liquors. State legislation has uniformly been founded upon the police power to protect the public morals, peace and good order, and upheld solely as an exercise of that power (*The License Cases*, 5 How. 504; *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1).

While prohibition is now constitutional as well as statutory, that fact cannot alter its essential objects and character.

It would seem clear, therefore, that offences against the National Prohibition Act belong in the first category described in the *Boorman* case, and the failure of Congress to include the high seas in its definition of the offence conclusively negatives the purpose of Congress in this regard.

2. Next we observe the absence of the words "ships" or "vessels of the United States" customarily employed in statutes defining offences upon the high seas (see Criminal Code, Sections 310, 301, 295, 293, 292, 291), as well as in acts relating to shipping (1 Stat. 287; Shipping Act, 1916; Ship Mortgage Act, 1920).

The only descriptive words which refer to water transportation are the words "boats" and "water craft" appearing in sections 21, 22, and 26 of Title II. These words are not ordinarily used to describe vessels capable of navigating the high seas. They are descriptive of small water craft. The nuisances referred to in the Act are such as could readily be maintained upon small water craft within our harbors or along our coasts. These words were construed in *The Saxon* (269 Fed. 639) where at page 641, the Court held:

"The words used as applicable to the means of transportation by water are 'water craft' and 'boat'. Ordinarily the term 'boat' and the term 'craft' are applied to water transporting conveyances of small character. As a rule, the word 'boat' is used somewhat in contradiction to the word 'vessel'—'vessel' being a boat of larger size, generally one fitted to navigate the high seas; while 'boat' as a rule was applied to an undecked, small, open vessel.

Anterior to the application of propulsion to small boats by means of gasoline, so as to bring them within the class of self-propelled vessels, the word 'boat' was usually applied to small, open vessels only, propelled by oars in the hands of oarsmen; although poetically, and otherwise, the term 'boat' may be sometimes applied to a vessel of any size. The word 'water craft', or the term 'craft', as

usually used, was applied to small vessels generally engaged in coastwise or domestic navigation. For larger vessels, as used in the present day, especially in the case of large iron steamships, the terms 'steamer', 'steamship', or 'vessel' are generally used. Unless, therefore, the generality of the language of the statute be sufficient to embrace vessels used in water transportation, of any size, and of any kind, the words of the statute in this case would not cover a large iron steamship."

3. As further evidencing the intention of Congress, it should be noted that the National Prohibition Act was enacted by the same (Sixty-sixth) Congress that enacted the Merchant Marine Act (41 Stat. 988). In the latter Act, Congress declared it "to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of . . . a merchant marine."

It is hard to believe that the Congress that declared this policy intended the National Prohibition Act to apply to American merchant vessels upon the high seas and in foreign ports, without an express declaration of such application.

4. A careful examination of all the debates in Congress preceding the adoption of the original and supplemental Act discloses that no word was uttered, either by those favoring or those opposed



to the legislation, indicating that either statute was deemed applicable to vessels of American registry outside our ports or waters. The scope of the word "territory" contained in the third section of the supplemental Act was discussed at length (Congressional Journal, Vol. 61, No. 96, pp. 5344-5345). In the debate Mr. Volstead expressed the following view as to section three:

"The National Prohibition Act is in force in the Virgin Islands and Hawaii and the only object of this is to confer jurisdiction on the territorial courts of those Territories."

There was no suggestion by anybody that it was intended to include American ships.

5. The National Prohibition Act contains a clause that is altogether inconsistent with the view that Congress meant to enforce prohibition on the high seas.

It is found in section twenty of title three which provides:

"That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt or spirituous liquors. . . . *Provided, that this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad.*"

The exception thus created for liquor in transit through the Panama Canal is not limited to foreign ships. It includes all ships, American or foreign. The words are "this section shall not apply." Certainly it was not created for the purpose of permitting importation of liquor into the Canal Zone, or sale to the inhabitants thereof, for these things are expressly forbidden.

Why then was the exception established? Manifestly because the Panama Canal is a link between two oceans.

If the intention was wholly to interdict the carriage and consumption of intoxicants upon the high seas, the exception is meaningless, so far as American ships are concerned. Can it be supposed Congress meant that it should be unlawful for an American vessel to carry liquors on the Atlantic ocean to the Canal, lawful to carry them through the Canal, and again unlawful to carry them, upon passing from the Canal to the waters of the Pacific?

On the theory that Congress did not intend to enforce prohibition upon the high seas, the exception of incidental transit from ocean to ocean through the Canal is entirely reasonable and consistent.

On any other theory, it involves the absurdity of supposing Congress to have granted express permission to do an act which must begin and end in the perpetration of a crime.

6. Strong practical reasons repel acceptance of the view that the prohibitory laws should be construed to embrace American ships upon the high seas or in foreign ports, unless they unequivocally so provide.

We do not allude to the obvious difficulty of enforcing prohibition upon American ships in foreign waters and ports, where alcoholic beverages are readily obtainable by passengers, seamen and stewards, although this might well serve to bring scandal and disrepute upon the administration of the law.

We refer to the essential difference between places that are at all times exclusively within our jurisdiction and places that are not.

Assuming a perfect enforcement of the law, it lies within the power of the United States to prevent all sales of beverages deemed intoxicating, both to our own and to foreign citizens, so long as they reside, sojourn or travel within our boundaries.

But the high seas are the highway of all nations, over which none has exclusive jurisdiction. There our passenger ships compete with those of other nations, which are far more numerous than ours, travel the same routes and offer equal accommodations. Our views as to prohibition are not shared by any other maritime nation of the world. No matter what our law may be, or how successful its enforcement, our government is powerless to prohibit the sale or consumption of

alcoholic beverages on the ships of other nations, beyond a marine league from our coasts.

No voyager desiring such beverages, if denied them upon ships of American registry, would be compelled to desist from their use, since at his choice he could travel by vessels on which they are procurable. Still less could abstinence be enforced in foreign ports.

Thus no real gain for prohibition or compulsory abstinence would be attained. The attempt to regulate the conduct of travellers upon the high seas and in foreign waters and ports would be inherently futile. That is the negative side.

The positive side is that certain nations, such as Belgium and Great Britain, require alcoholic liquors to be carried as sea-stores. Italy requires wine to be served to her people who are passengers. It can hardly be assumed that these countries will change their laws to conform with ours. On that point speculation is idle.

The present reality is that if vessels of the United States are held to be within the prohibitory mandate, it will be impossible for passenger ships of American registry to clear from English or Belgian ports, or to transport Italian subjects to America, without violation of the law.

The sole practical result thus accomplished would be an irreparable injury to our merchant marine.

In fact, the probable consequence would be the disappearance of our flag from the ocean routes,

so far as privately owned passenger vessels are concerned.

Such ships are indispensable to the development of a merchant marine, because they alone are capable of furnishing rapid transportation for cargoes, passengers and mails in time of peace, and of being converted into naval auxiliaries in time of war.

These considerations far transcend the mere question of property values. They affect the national prosperity and security.

7. This argument does not involve the denial, or the affirmance, of the authority of Congress, under its power to regulate commerce, to prohibit sales of intoxicating liquors upon ships of American registry, while upon the high seas or in foreign ports.

But it is clear from the language of the legislation, and circumstances attending its enactment, that Congress has not seen fit so to provide.

#### CONCLUSION.

It is therefore respectfully submitted that the judgment of the court below should be reversed.

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FREDERICK H. STOKES,  
Of Counsel.

# Sea Stores of Foreign Vessels.

JAN 3 1923

FILED

IN THE

## Supreme Court of the United States

October Term, 1922

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HENDERSON BROTHERS) LTD., <i>against</i>	Appellants,	#659.
ANDREW W. MELLON, <i>et al.</i> ,	Appellees.	
OCEANIC STEAM NAVIGATION COMPANY, LTD., <i>against</i>	Appellants,	#660.
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### APPELLANTS' REPLY BRIEF.

GEORGE W. WICKERSHAM,  
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## **Errata in Appellants' Principal Brief:**

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p. 7: for "at page 67" read "at page 75."

p. 14: for "mentioned (p. 67)" read "mentioned (p. 75)."

p. 15: for "brief (p. 69)" read "brief (p. 77)."

p. 15: for "brief (p. 76)" read "brief (p. 84)."

pp. 16 and 19: for "all territories subject" read "all territory subject."

p. 55: for "Ch. T." read "Ch. J."

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## Sea Stores of Foreign Vessels.

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***Appeals from the District Court of the United States  
for the Southern District of New York.***

### **APPELLANTS' REPLY BRIEF.**

#### I.

The Government in its brief argues that a foreign ship within the territorial waters of the United States is

subject to the jurisdiction of the United States. This proposition we do not dispute. We do contend that such jurisdiction is to be exercised in conformity with the principles of international law and the usages and customs of intercourse with foreign nations; that certain well recognized exceptions to the exercise of that jurisdiction always have been claimed and observed by our Government, and that where Congress has intended to extend the police regulations of the United States over foreign ships within our ports, it has expressly declared such intention in unmistakable terms. The Government cites the case of *United States v. Bowman* (43 Sup. Ct., 39), No. 69, October Term, 1922, recently determined by this Court, to the effect that a merchant ship wherever she goes carries the laws of her country, and for a violation of them, those on board may be subjected to punishment, while at the same time, when she enters the waters of another nation, she becomes also subject to the jurisdiction of the laws of the littoral state; which is undoubtedly true, to the extent to which these laws are applied by the legislative power of such state to such ships. The distinction is evidenced by the decisions of this Court in the application of the patent laws of the United States. Thus, in *Brown v. Duchesne*, 19 How., 183, cited at pages 34-35 of our principal brief, the Court held that the right of property and exclusive right of use granted by the laws of the United States to a patentee did not extend to a foreign merchant vessel lawfully in one of our ports; while in *Gardiner v. Howe*, 2 Cliff., 462, Fed. Cas. No. 5219, the owner of the same patent as that considered by the Court in *Brown v. Duchesne*, having sued the owner of an American ship for its use and the defendant claiming that the improvement was applied only to the mechanism of the vessel when employed on the high seas and was only used on the high seas, without the jurisdiction of the United States, and therefore that the

patent laws of the United States were not applicable, Mr. Justice CLIFFORD, sitting in the Circuit Court, held that the use of the patented invention without the consent of the patentee, upon an American ship, even on the high seas, was an act of infringement, saying:

"The patent laws of the United States afford no protection to inventions beyond or outside of the jurisdiction of the United States; but this jurisdiction extends to the decks of American vessels on the high seas, as much as it does to all the territory of the country, and for many purposes is even more exclusive."

The opinion of Mr. Justice CURTIS in *Brown v. Duchesne*, in the Circuit Court (2 Curt., 371 Fed. Cas. No. 2004), carefully draws the distinction. He first states that the terms of the grant of exclusive right to use the patented invention

"are broad enough to include every use, by all persons *within the territory of the United States*. But this grant, and the exclusive rights conferred by it, are creatures of the municipal law of our country; and however comprehensive may be its terms, they cannot be so construed as to include, either persons or things, not within the jurisdiction of the patent laws. Persons or things may be out of the jurisdiction of the municipal law, either because they are locally, where it is not in the power of our country to extend its operations, or because the nation has chosen not to exert its entire legislative power, but to leave particular persons or things, though within its dominion, free from the operations of its laws. This last exemption, depending solely on the will of the nation, may either be entire, or partial and limited, according to its own choice, which may be manifested through the legislative power, by express exemptions or restrictions in the text of written laws, *or it may be derived from the usages and practice of civilized nations, and the presumed intent of each, to conform thereto, until an opposite pur-*

*pose is manifested*; and in the absence of positive legislation, courts of justice in this country and in England have constantly and rightfully exercised the power of determining, in what cases and to what extent, it is the will of the nation, not to extend to foreigners or their property, the municipal laws, which in similar cases, govern our own citizens." (*Italics ours.*)

Reference was then made to the case of *The Exchange*, 7 Cranch, 116; *The Appollon*, 9 Wheat., 362; *In re Bruce*, 2 Crompt. & J., 437; *Universities of Oxford & Cambridge v. Richardson*, 6 Ves., 689; *Thompson v. Advocate General*, 12 Cl. & F., 1. The learned judge then continued as follows:

"Upon the same footing of a presumed consent of the nation, rests the well-settled exemption of ambassadors and public ministers, from the jurisdiction of the laws of the country to which they are accredited. And, indeed, those numerous cases of contract, and distribution of personalty, the status of persons, and many other relations, which are allowed to be governed by the laws of the domicile or of the place of the contract, though foreign to the nation which permits their operation, are all instances of partial exemption of the persons or property of foreigners from the jurisdiction of our municipal laws, not provided for by any expressed will of the legislative power, but implied by courts of justice, from their general fitness and convenience, and from the presumed acquiescence of our country in principles and usages, which civilized countries generally have practiced. Conceding therefore, that this French vessel was within our territory, and subject to all our laws, so far as it was the will of the United States to extend those laws over it, and that the terms of the grant to the plaintiff are broad enough to cover every use of the thing patented, within the jurisdiction of the laws of the United States, *the inquiry still remains, whether a law of this character, was intended by Congress to apply to*

*and govern a vessel of a foreign friendly nation, entering our ports, by our consent, for purposes of trade."* (Italics ours.)

All of the decisions cited in the opposing briefs in support of the proposition that the Prohibition Act applies to sea stores on foreign ships were based upon statutes specifically made applicable to foreign vessels. Thus, the *Abby Dodge v. United States*, 223 U. S., 166 (brief of *Amici Curiae*, pp. 28, *et seq.*) turned upon the enforcement of a statute (34 Stat., 313) which made it unlawful "to land, deliver, cure, or offer for sale at any port or place in the United States any sponges taken by means of diving or diving apparatus" from certain waters. The statute prohibited the landing, delivery, curing, or offering for sale *at any port or place in the United States*. It seems never to have occurred to anyone that the *possession* on the ship of sponges which could not be landed because of this prohibition was itself prohibited.

So the Harter Act (27 Stat., 445) declared it to be unlawful for the representative or owner of "*any vessel*" transporting merchandise "*from or between ports of the United States and foreign ports*, to insert in" a bill of lading a clause relieving against damage for negligence in proper storing, etc. This was a regulation of foreign commerce which, necessarily, was held applicable to *any* ship, domestic or foreign, engaged in such commerce. *Knott v. Botany Mills*, 179 U. S., 69.

So the Limited Liability Act of 1851, U. S. R. S., Secs. 4282, *et seq.*, prescribed a rule of decision for the Courts of the United States with respect to the limitation of liability of the owners of vessels for losses arising from certain causes. The statute did not discriminate between the owners of foreign and of domestic vessels, and therefore was held applicable to both when suing or being sued in our Courts. *The "Scotland": National Steam Nav. Co. v. The "Kate Dyer"*, 105 U. S., 24.

Statutes (*e. g.*, 29 Stat., 604) forbidding importation of certain merchandise, such as teas of inferior quality (*Buttfield v. Stranahan*, 192 U. S., 470), are wholly irrelevant to the present question which is not one of Congressional *power*, but of *construction* of a constitutional amendment, and of the statute purporting to carry out its provisions.

## II.

The construction contended for by the Government would make it impossible to treat even a foreign vessel forced by stress of weather into one of our ports, as exempt from the provisions of our laws, and the vessel of a foreign nation carrying a cargo of vinous or spirituous liquors between foreign ports, thrown by stress of weather upon our shores, would be forfeit by our laws, by force of the 18th Amendment and the National Prohibition Act, irrespective of all principles of international law and customary usages of civilized nations. This seems to us a perfect *reductio ad absurdum* of the Government's contention that the 18th Amendment operates *ex proprio vigore* wherever the United States may exercise its power, whether strictly within its "territory" or otherwise.

Our Government consistently has maintained, as against foreign governments, immunity from penalties for violating neutral laws, or liability to seizure for bringing goods subject to customs revenues within the jurisdiction, or for other violation of legislation affecting merchant vessels in foreign ports, and itself has conceded to foreign merchant vessels such immunity, where such vessels were forced by stress of weather to enter the jurisdictional waters of a country foreign to the flag of the ship. See 2 Moore's Dig. Int. L., pp. 339, 362.

An interesting example of this doctrine occurred in the cases of the *Enterprise*, *Hermosa* and *Creole*, which

arose after August 1, 1834, when the act of the British Parliament of August 28, 1833 (3 & 4 Wm. IV c. 73), for the abolition of slavery in the British colonies took effect, and the British Government refused to acknowledge any liability for the liberation of slaves which were on vessels seized by the British colonial authorities, upon the ground that the slaves on entering British jurisdiction became free. The United States, on the other hand, successfully maintained that "if a vessel were driven by necessity to enter the port of another nation the local law could not operate so as to affect existing rights of property as between persons on board, or their personal obligations or relations under the law of the country to which the vessel belonged. In the case of the *Creole*, this argument was emphasized by the fact that the vessel was brought into British jurisdiction by means of a crime against the law of the flag." 2 Moore's Dig. Int. L., p. 352. So, where a coasting vessel bound from one port to another in the United States was carried by mutineers into a foreign port, the officers of such vessel were held to be entitled to aid from the local authorities in recovering control, and the cargo was held not subject to confiscation or disposal in such port "because it may consist of articles which are there held not to be the subject of property" (*Ibid*).

Mr. Webster, in his letter to Mr. Everett, U. S. Minister to England, January 29, 1842, cited in 2 Moore's Dig. Int. L., pp. 352, 353, wrote as follows:

"In cases of vessels carried into British ports by violence or stress of weather, we insist that there shall be no interference from the land, with the relation or personal condition of those on board, according to the laws of their own country; that vessels under such circumstances shall enjoy the common laws of hospitality, subjected to no force, entitled to have their immediate wants and necessities relieved, and to pursue their voyage without molestation."



ported merchandise: *Provided*, That bunker coal, bunker oil, ships' stores, sea stores, or the legitimate equipment of vessels belonging to regular lines plying between foreign ports and the United States, which are delayed in port for any cause, may be transferred under a permit by the collector and under customs supervision from the vessel so delayed to another vessel of the same line, and owner, and engaged in the foreign trade without the payment of duty thereon." (Italics ours.)

Section 583, requires the master to deliver to designated United States authorities one copy of the manifest of such vessel.

"SEC. 584. FALSIFY OR LACK OF MANIFEST.—Any master of any vessel and any person in charge of any vehicle bound to the United States who does not produce the manifest to the officer demanding the same shall be liable to a penalty of \$500, and if any merchandise, including sea stores, is found on board of or after unlading from such vessel or vehicle which is not included or described in said manifest or does not agree therewith, the master of such vessel or the person in charge of such vehicle shall be liable to a penalty equal to the value of the merchandise so found or unladen, and any such merchandise belonging or consigned to the master or other officer or to any of the crew of such vessel, or to the owner or person in charge of such vehicle, shall be subject to forfeiture, and if any merchandise described in such manifest is not found on board the vessel or vehicle the master or other person in charge shall be subject to a penalty of \$500; *Provided*, That if the collector shall be satisfied that the manifest was lost or mislaid without intentional fraud, or was defaced by accident, or is incorrect by reason of clerical error or other mistake and that no part of the merchandise not found on board was unshipped or discharged except as specified in the report of the master, said penalties shall not be incurred.

*"If any such merchandise so found consist of smoking opium or opium prepared for smoking,*

the master of such vessel or the person in charge of such vehicle shall be liable to a penalty of \$25 for each ounce thereof so found. Such penalty shall constitute a lien upon such vessel which may be enforced by a libel *in rem*. Clearance of any such vessel may be withheld until such penalty is paid or until a bond, satisfactory to the collector, is given for the payment thereof. The provisions of this paragraph shall not prevent the forfeiture of any such vessel or vehicle under any other provisions of law." (Italics ours.)

Section 586, imposes a penalty upon the master of any vessel from a foreign port or place who allows any merchandise "*(including sea stores)*," to be unladen before he has received a permit, with certain exceptions as to a vessel unladen because of accident, stress of weather or other necessity.

Section 587, imposes upon the master, and any one assisting him, in case any merchandise "*(including sea stores)*" unladen in violation of the provisions of Section 586 is transshipped to or placed in or received on another vessel.

Section 2796 R. S., which provided for the taxation of any excessive amount of goods listed as ship stores, is not re-enacted, save as it is provided in Section 432 of the Tariff Act of 1922, that any ship stores landed without a permit are subject to forfeiture, and in Section 446, that any ship's stores landed and delivered from a vessel shall be considered as imported merchandise.

With the exception of the provisions left in Section 446, the provisions omitted from the various sections of the Revised Statutes, above quoted, are those applicable to and included in the earlier legislation for the purpose of facilitating the collection of import duties. The importation of intoxicating liquor being prohibited by the Eighteenth Amendment and the statute, these provisions were eliminated from the re-enacted portions of the Tariff Law of 1922. But it is significant, that while pro-

vision is made for the confiscation of smoking opium, if any be found, as provided in Section 584, nowhere is there a line prohibiting the inclusion in the sea stores which shall be shown on the manifest and which by Section 446 are expressly permitted to be retained on board, of intoxicating liquors. Assuredly, if Congress had intended to extend the provisions of the Prohibition Law to liquor carried as sea stores on foreign vessels coming into our ports, it would have said so in some one of the administrative sections contained in the Tariff Act of 1922. It also is significant that in permitting sea stores described in the manifest to remain on board the vessel, Congress did not attempt to narrow the definition of ship's or sea stores so long established and recognized by both the executive and judicial branches of our Government. (See our principal brief, pp. 52-57.) The omission from the provisions of the Tariff Act of 1922 of so much of R. S., Section 2775, as required the master to particularize the quantity and kind of wines and spirits carried as sea stores, merely eliminated provisions designed to facilitate the collection of import duties imposed in case such wines or spirits were landed in violation of the statute. This section was originally part of the "Collection Act" of March 2, 1799. It is found in the Revised Statutes under the title "Collection of Duties Upon Imports." It covered two distinct subject-matters, to wit, general merchandise and sea stores, in the following language:

"The master of any vessel having on board distilled spirits or wines shall \* \* \* in addition to the requirements of the preceding section, report \* \* \* [1] \* \* \* the quantity and kinds of spirits and wines, on board of the vessel, particularizing the number of casks, vessels, cases \* \* \* with their marks or numbers, [2] as also the quantity and kinds of spirits and wines, on board such vessel as sea stores \* \* \*."

The purpose of this section clearly was to serve as an additional aid in the enforcement of the collection of duties upon imported liquor. The inclusion of the provision of [2] with reference to sea stores is quite consistent with this purpose, for R. S. Section 2796 provides "that whenever it appears that the quantities of the articles \* \* \* reported as sea stores are excessive, the collector \* \* \* may \* \* \* estimate the amount of the duty on such cases \* \* \*" and proceed to collect it.

The Circuit Court of Appeals for the Fifth Circuit, in *United States v. Santani*, 279 Fed., 534, 536, in construing R. S. Sections 2766, 2867 and 2872, which are a part of the same title as R. S. 2775, said, per BRYAN, Cir. J.:

*"In order to secure the collections of customs duties, it is required that ships entering ports of the United States shall carry manifests containing a list of all merchandise, and shall not unload cargoes without exhibiting the manifests, and without affording an opportunity for inspection. It is not only goods entitled to entry that are required to be shown on the manifests, but prohibited goods are also required to be listed. Otherwise it would be impossible to prevent evasions, frauds upon the revenue, and prohibited importations. \* \* \* The inclusion of Sec. 2766 was for the purpose of aiding in the enforcement of the law." (Italics ours.)*

R. S. Sec. 2775 clearly was enacted for the same purpose.

The repeal of R. S. Sec. 2775, together with all other sections of the Revised Statutes above referred to bearing upon the enforcement of "collection of duties upon imports," is merely a logical and quite incidental part in the recasting of the administrative provisions of the import duty enactments now embraced in the new Tariff Act of 1922. The fact that the *importation into the United States* of liquor is now illegal would make a re-

enactment of R. S. Section 2775 totally unnecessary. The repeal, without re-enactment of this section, is merely the elimination of dead wood in a new series of import duty enactments and no such significance can be attached to it as that sought to be attached by the Government.

To paraphrase the language of the Government brief, it would seem to follow by necessary implication that if Congress, when it passed the Tariff Act of September 21, 1922, and repealed the provisions of the Revised Statutes above provided, had intended to prohibit liquors from being included as sea stores, it would have made some specific provision to that end.

#### IV.

Despite the fact so eloquently set forth in the Government's brief, that the Prohibition Amendment and Laws are the fruition of half a century of ardent efforts, prosecuted with religious zeal, we cannot understand why they should be given wider scope than the fundamental guarantees against unreasonable searches and seizures, of trial by jury; of protection against loss of life, liberty or property save by due process of law, of double jeopardy, of excessive bail or cruel and unusual punishments—rights which from the time of Magna Charta to the present day have been regarded by Englishmen and Americans as the foundation stones of civilized life. Yet these, outside of the limits of continental United States, in its territories, on its ships, in the administration of laws by its consular agents, depend upon the will of Congress and are not within the protection of the Constitution itself.

*In re Ross*, 140 U. S., 453;

*Scott v. Sandford*, 19 How., 393;

*National Bank v. Yankton*, 101 U. S., 129;

*De Lima v. Bidwell*, 182 U. S., 1, 1096;

*Downes v. Bidwell*, 182 U. S., 244;  
*Mormon Church v. U. S.*, 136 U. S., 1.  
*Reynolds v. U. S.*, 98 U. S., 145;  
*Hawaii v. Mankichi*, 190 U. S., 197;  
*Rasmussen v. U. S.*, 197 U. S., 516.

The Eighteenth Amendment prohibits certain acts, such as the manufacture and sale of intoxicating liquors for beverage purposes, within the United States, "and all territory subject to the jurisdiction thereof."

The Thirteenth Amendment declares that the status of slavery never shall exist "within the United States, or any place subject to their jurisdiction." The difference in the words employed cannot be ignored. This Court said in the *National Prohibition Cases*, 253 U. S., 350, 386:

"The first section of the Amendment \* \* \* is operative throughout the entire territorial limits of the United States."

Of the Thirteenth Amendment, this Court, in *Clyatt v. United States*, 197 U. S., 207, 216-18, said, per BREWER, J.:

"This amendment denounces a status or condition, irrespective of the manner or authority by which it is created. \* \* \* It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation, \* \* \* This legislation is not limited to the Territories or other parts of the strictly National domain, but is operative in the States and wherever the sovereignty of the United States extends."

The power of the United States to make Prohibition applicable to sea stores on foreign merchant vessels is not doubted. But we most earnestly contend that it has *not* done so by the existing provisions.

It is not accurate to say, as the Government does in its brief, that the prohibition is "aimed at the total eradica-

tion of the use of intoxicating liquors of every kind and under all circumstances, except for strictly limited medicinal and sacramental purposes." (Appellees' Brief, p. 15.)

The Amendment aims only at intoxicating liquors for beverage purposes. The Act expressly permits (Title II, Section 3) the manufacture, purchase, sale, export, import, possession and transportation of "liquor for non-beverage purposes and wine for sacramental purposes." It also expressly permits the "purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses" (*ibid*). It expressly permits the storage in bonded warehouses of all liquor manufactured prior to the taking effect of the Act (Title II, Section 37). By the Amending Act of November 23, 1921 (42 Stat., 222, 223), when the amount of spirituous liquor in distilleries and bonded warehouses at the date of its passage shall have been reduced to a quantity insufficient to supply its need for non-beverage purposes, and such need cannot be supplied by production within the United States, enough may be imported from foreign countries to meet such non-beverage needs (Section 2). This is very different from the way in which our laws deal with cocaine and opium. There is a broad distinction between these drugs, which never can be safely entrusted to one who is not a physician, and such alcoholic beverages as have been freely used since the dawn of history and now are freely used in most parts of the world, and whose use is expressly permitted by law in the homes of the United States.

The fact is, that the attempt to enforce prohibition has made such a profound impression upon the official mind, that the limitations of the Eighteenth Amendment have been lost sight of. To say that the Amendment and the Act aim to exclude all alcoholic beverages from the United States, is simply to disregard their provisions. To contend that the mere presence of such beverages

among the sea stores of foreign ships which happen to be in American ports violates the intent of the framers of the Amendment and the Act, ignores the language of these measures. When Congress intends wholly to exclude an article from its jurisdiction, it legislates as it has done with respect to smoking opium. The presence of alcoholic beverages among the sea stores of a foreign ship is no more a violation of our prohibitory system than the presence of such commodities in the homes, the apothecary shops, or the bonded warehouses of our country, which is expressly allowed. There is no more danger that liquors in sea stores on foreign ships shall escape and corrupt our people than that there shall be leakage from the millions of gallons stored in United States bonded warehouses. The *spirit* of the prohibition as enacted by law does not require the exclusion of these stores. The *letter* of the Amendment and the Act does not extend to such stores, if they be construed in conformity with established rules of construction of statutes to avoid conflict with international law or international usage.

GEORGE W. WICKERSHAM,  
*Counsel for Appellants.*



**OPINION**

CUNARD STEAMSHIP COMPANY, LTD., ET AL.  
v. MELLON, SECRETARY OF THE TREASURY,  
ET AL.

OCEANIC STEAM NAVIGATION COMPANY, LTD.,  
v. MELLON, SECRETARY OF THE TREASURY,  
ET AL.

INTERNATIONAL NAVIGATION COMPANY, LTD.,  
v. MELLON, SECRETARY OF THE TREASURY,  
ET AL.

COMPAGNIE GENERALE TRANSATLANTIQUE  
v. MELLON, SECRETARY OF THE TREASURY,  
ET AL.

NETHERLANDS - AMERICAN STEAM NAVIGA-  
TION COMPANY (HOLLAND AMERICA LINE)  
v. MELLON, SECRETARY OF THE TREASURY,  
ET AL.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM  
NAVIGATION COMPANY, LTD., v. MELLON,  
SECRETARY OF THE TREASURY, ET AL.

ROYAL MAIL STEAM PACKET COMPANY v. MELLON,  
SECRETARY OF THE TREASURY, ET AL.

UNITED STEAMSHIP COMPANY OF COPEN-  
HAGEN (SCANDINAVIAN AMERICAN LINE)  
v. MELLON, SECRETARY OF THE TREASURY,  
ET AL.

PACIFIC STEAM NAVIGATION COMPANY v. MELLON,  
SECRETARY OF THE TREASURY, ET AL.

NAVIGAZIONE GENERALE ITALIANA v. MELLON,  
SECRETARY OF THE TREASURY, ET AL.

INTERNATIONAL MERCANTILE MARINE COMPANY v. STUART, ACTING COLLECTOR OF CUSTOMS FOR THE PORT OF NEW YORK, ET AL.

UNITED AMERICAN LINES, INC., ET AL. v. STUART, ACTING COLLECTOR OF CUSTOMS FOR THE PORT OF NEW YORK, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 659-662, 666-670, 678, 693, 694. Argued January 4, 5, 1923.—  
Decided April 30, 1923.

1. The words "transportation" and "importation," in the Eighteenth Amendment, are to be taken in their ordinary sense, the former comprehending any real carrying about or from one place to another, and the latter any actual bringing into the country from the outside. P. 121.
2. The word "territory," in the Amendment (in the phrase "the United States and all territory subject to the jurisdiction thereof,") means the regional areas, of land and adjacent waters, over which the United States claims and exercises dominion and control as a sovereign power,—the term being used in a physical, not a metaphorical sense, and referring to areas and districts having fixity of location and recognized boundaries. P. 122.
3. The territory subject to the jurisdiction of the United States includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles; and this territory, and all of it, is that which the Amendment designates as its field of operation. P. 122.
4. Domestic merchant ships outside the waters of the United States, whether on the high seas or in foreign waters, are part of the "territory" of the United States in a metaphorical sense only, and are not covered by the Amendment. P. 123.
5. The jurisdiction arising out of the nationality of a merchant ship, as established by her domicile, registry and use of the flag, partakes more of the characteristics of personal than of territorial sovereignty, is chiefly applicable to ships on the high seas where there is no territorial sovereign; and, as respects ships in foreign

territorial waters, it has little application beyond what is affirmatively or tacitly permitted by the local sovereign. P. 123.

6. The Amendment covers foreign merchant ships when within the territorial waters of the United States. P. 124.
7. A merchant ship of one country, voluntarily entering the territorial limits of another, subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place, and correlatively is bound to yield obedience to them. The local sovereign may, out of considerations of public policy, choose to forego the exertion of its jurisdiction, or to exert it in a limited way only, but this is a matter resting solely in its discretion. P. 124.
8. The Eighteenth Amendment does not prescribe any penalties, forfeitures, or mode of enforcement, but by its second section leaves these to legislative action. P. 126.
9. The only instance in which the National Prohibition Act recognizes the possession of intoxicating liquor for beverage purposes as lawful, is where the liquor was obtained before the act went into effect and is kept in the owner's dwelling for use therein by him, his family, and his *bona fide* guests. P. 127.
10. Examination of the National Prohibition Act, as supplemented November 23, 1921, c. 134, 42 Stat. 222, shows,
  - (a) That it is intended to be operative throughout the territorial limits of the United States, with the single exception of liquor in transit through the Panama Canal or on the Panama Railroad,
  - (b) That it is not intended to apply to domestic vessels when outside the territorial waters of the United States,
  - (c) That it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters, save as the Panama Canal Zone exception provides otherwise. Pp. 127-129.
11. Congress, however, has power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign. P. 129.
12. The antiquity of the practice of carrying intoxicating liquors for beverage purposes as part of a ship's sea stores, the wide extent of the practice and its recognition in a congressional enactment, do not go to prove that the Eighteenth Amendment and the Prohibition Act could not have been intended to disturb that practice, since their avowed and obvious purpose was to put an end to prior practices respecting such liquors. P. 129.

13. After the adoption of the Amendment and the enactment of the National Prohibition Act, Congress withdrew the prior statutory recognition of liquors as legitimate sea stores. Rev. Stats., § 2775; Act of September 21, 1922, c. 356, Tit. IV, and § 642, 42 Stat. 858, 948, 989. P. 130.
14. The carrying of intoxicating liquors, as sea stores, for beverage purposes, through the territorial waters or into the ports and harbors, of the United States, by foreign or domestic merchant ships, is forbidden by the Amendment and the act. P. 130.
- 284 Fed. 890, affirmed.
- 285 Fed. 79, reversed.

APPEALS from decrees of the District Court dismissing, on the merits, as many suits brought by the appellant steamship companies for the purpose of enjoining officials of the United States from seizing liquors carried by appellants' passenger ships as sea stores and from taking other proceedings against the companies and their vessels, under the National Prohibition Act.

*Mr. George W. Wickersham* for appellants in Nos. 659-662, 666-670, and 678.

I. Neither the Eighteenth Amendment, nor the National Prohibition Act, properly construed, requires the application of the prohibition to every place where the United States may exercise its power.

This statute contained no provision defining the territory within which it should be operative. It, therefore, was governed by the provisions of Rev. Stats., § 1891: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

A question having arisen as to the jurisdiction of the courts in the territories and insular possessions of the United States to enforce the act, a section was enacted in the Supplemental Act of November 23, 1921. An examination of the debates preceding this discloses only a

most perfunctory consideration of the section. It clearly appears that the dominating purpose underlying its inclusion in the act was to give power to the courts of Hawaii and the Virgin Islands to enforce the statute.

There is nothing else in all of the many pages of the Congressional Record devoted to a discussion of these two acts which throws any further light upon the territorial limitations of their application. Especially is there nothing to indicate that Congress was extending the application of the law to any place not previously embraced within the description contained in the Amendment, "the United States and all the territories subject to the jurisdiction thereof." It surely is a strained construction to hold that a foreign ship temporarily within American waters is embraced within the phrase "the territories subject to the jurisdiction" of the United States. Nothing in the legislative history of the act supports the contention that Congress had any such intention.

Evidently Congress was in some doubt as to whether or not the National Prohibition Act, *ex proprio vigore*, applied to territories which had not been embodied within the United States, and, therefore, deemed it necessary specifically to extend it to such territory. The Philippine Islands undoubtedly are territory subject to the jurisdiction of the United States, yet we have not heard that the Eighteenth Amendment *ex proprio vigore* applies to them, nor that the National Prohibition Act governs them. Moreover, § 20, Tit. III, of that act itself involves a recognition of the fact that the statute by its own terms did not apply to everything subject to the jurisdiction of the United States, because it specifically provides for its application to the Canal Zone—which has been defined as not a "territory" but "a place subject to the jurisdiction of the United States" (25 Ops. Atty. Gen. 441), and also expressly provides that it shall not apply to liquor in transit through that zone by railroad or steamship.

It is difficult to understand why, if Congress was right in supposing it could exclude transportation of liquors from the application of the Amendment under any circumstances, it could not exclude it by failure specifically to include, as well as by an exception expressly grafted on to a comprehensive inclusion.

In our view, § 20, Tit. III, involves the expression of an important recognition by Congress that it has power under the Amendment to exclude from the operations of prohibition in some instances, and, if that be true, the words "*territory subject to the jurisdiction thereof*" in the Eighteenth Amendment cannot mean "*wherever the United States may exercise its power*," as contended by the Government.

The conclusions announced by this Court in the *National Prohibition Cases*, 253 U. S. 350, are not at variance with this view. Nor do we think that *Grogan v. Walker & Sons Co.* and *Anchor Line v. Aldridge*, 259 U. S. 80, are.

In adopting the broad canon of construction which controlled the decision rendered by this Court in the *Grogan* and *Anchor Line Cases*, it is evident that the Court placed emphasis upon the controlling force of the admonition contained in § 3 of Tit. II of the National Prohibition Act, enjoining liberality of construction, to the end that the use of intoxicating liquor as a beverage might be prevented. Let us consider what meaning and purpose are to be assigned to the Eighteenth Amendment and the enforcing act. Certainly the first sense of every law must be that the field of its operation is the country of its enactment. This is equally true of the Eighteenth Amendment and the National Prohibition Act. Necessarily, they get their meaning from the field and purpose of their operation—from the conditions which exist in the field or are designed to be established there. The transportation that they prohibit is transportation within that field—that is, the United States and its Territories, "for



beverage purposes." The transportation and the purposes are, therefore, complements of each other and both must exist to fulfill the declared prohibition. Thus considered, the "admonition" which received such emphasis in the adoption of this broad canon of construction, and was relied upon by the lower court herein, loses all force under the circumstances of the instant case. Liberality of interpretation is enjoined to the end "that the use of intoxicating liquor as a beverage" may be prevented. These words carry with them an unspoken but necessary qualification, namely, "within the United States, its Territories, Hawaii, and the Virgin Islands."

We have said that the transportation and purposes are complements of each other and both must exist to fulfill the required prohibition. The foreign steamship lines do not seek to transport liquor through, for use as a beverage within, the United States, its Territories, Hawaii, or the Virgin Islands.

II. A foreign ship temporarily within the waters of the United States is not "territory subject to the jurisdiction" of the United States, within the meaning of the Eighteenth Amendment and the National Prohibition Act.

The jurisdiction exercised by a State over foreign vessels within her waters has been the subject of much controversy. On the one hand, it is held that, in a sense, the vessel is part of the territory of the Nation to which it belongs, and those on board are subject to its laws, even in a foreign port (*Vattel*, book 1, c. 19, § 216; *Wheat. Int. Law*, 157; *Brown v. Duchesne*, 19 How. 183; *Wilson v. McNamee*, 102 U. S. 572; *United States v. Bowman*, 260 U. S. 94), while on the other hand, it is held, with certain reservations, that by voluntarily coming into the waters or ports of one Nation, the ships of another submit themselves to the laws of the former. *United States v. Diekelman*, 92 U. S. 520; *Wildenhus's Case*, 120 U. S. 1; *The*



*Exchange*, 7 Cr. 116, 144. See 2 Moore Int. Law Dig., p. 292; 8 Ops. Atty. Gen. 73; Taylor, Int. Law, § 268; Wheaton, Int. Law, 5th Eng. ed. (Phillipson), p. 169; 2 Wharton, Conflict of Laws, 3d ed., §§ 816, 817; 42 Albany Law Jour., pp. 345-353; 1 Oppenheim, Int. Law, 3d ed., § 189; Ortolan, *Diplomatie de la Mer*, vol. 1, pp. 192, 193; Gregory, 2 Mich. Law Rev., p. 333; 1 Halleck, Int. Law, 4th ed. (Baker), pp. 245-247; Wheaton, El. Int. Law, 8th ed., § 95, note 58; *United States v. Bowman*, 260 U. S. 94.

III. The courts will never give a construction to a statute contrary to international law or the accepted custom and usage of civilized nations, when it is possible reasonably to construe it in any other manner. *The Paquete Habana*, 175 U. S. 677; *Murray v. Schooner Charming Betsy*, 2 Cr. 64.

The same rule, *a fortiori*, should apply to the construction of a provision in the Constitution. Presumably, provisions of the latter are not intended to regulate the affairs of foreign nations or to upset established international usage. If, as we contend, the Amendment does not foreclose the question, then it becomes one of statutory construction, namely, whether Congress intended to disregard the long established general rule respecting the jurisdiction of the country of a visiting ship over its internal affairs and to impose its will with respect to such internal management, in cases which cannot in any respect be considered as affecting the peace and order of the port into which the ships come. In construing other statutes which might affect such internal management, the federal courts have been careful to avoid, unless constrained by the obvious, inescapable meaning of the act, giving such construction to the statute as would lead to a conflict of laws, or interference with well settled international usage, or unduly interfere with the internal management of the ship. *The Exchange*, 7 Cr. 116, 136, 146; *Murray v.*

*Schooner Charming Betsy*, *supra*, 118; *The Brig Wilson v. United States*, Fed. Cas. No. 17,846; *Brown v. Duchesne*, 19 How. 183; *The State of Maine*, 22 Fed. 734; *The Kestor*, 110 Fed. 432; *Patterson v. Bark Eudora*, 190 U. S. 169; *Wildenhus's Case*, 120 U. S. 1, 11, 12; *Sandberg v. McDonald*, 248 U. S. 185; *Neilson v. Rhine Shipping Co.*, 248 U. S. 205.

So it uniformly has been held that the acts prohibiting the bringing of Chinese laborers to the United States are not violated by a foreign vessel coming into one of our ports with Chinese as seamen or members of the crew. *In re Moncan*, 14 Fed. 44; *United States v. Ah Fook*, 183 Fed. 33; *United States v. Burke*, 99 Fed. 895; *United States v. Jamieson*, 185 Fed. 165; appeal dismissed 223 U. S. 744.

See *Taylor v. United States*, 207 U. S. 120; *Scharrenberg v. Dollar S. S. Co.*, 245 U. S. 122.

The executive departments also always have exercised like care in avoiding such interpretative application of statutes as unnecessarily to interfere with international commercial relations. 27 Ops. Atty. Gen. 440.

The care which Congress used to exclude opium from our territorial waters serves also to point out the underlying distinction between the situation there existing and the facts of the instant case. Section 5 of the Opium Act dealt only with smoking opium, which had no legitimate uses and which for years had been considered an international outlaw, the mere presence of which within their borders was considered intolerable by all civilized nations. Here, on the other hand, it appears from an examination of the National Prohibition Act that Congress has permitted the possession and use of intoxicating beverages in the homes of our people if acquired prior to the effective date thereof. The act also repeatedly recognizes as legal the existence of large quantities of bonded liquor within the United States, as also the manufacture, sale and trans-

portation of intoxicating liquor for other than beverage purposes (§ 3 and § 37 of Tit. II). It cannot, therefore, be said that the National Prohibition Act imposes an *unqualified prohibition*, still less can it be said that Congress intended to prevent the mere presence within our borders of intoxicating beverages under any and all circumstances; for the act itself proves a contrary intention. Congress has not only failed to use language sufficient to indicate that liquor could not be possessed within our borders for any purpose, but, under the system of qualified prohibition imposed by the act, there was no reason why it should prohibit the presence of such liquor within our territorial waters as an incidental element to the continuation of international commerce, sanctioned by the usage and custom of civilized nations since the inception of our Government. In marked contrast with this, also, is the record of congressional action respecting the subject under consideration in the cases at bar. From the date of the enactment of the National Prohibition Act, foreign ships had been bringing into American waters and ports liquors as a part of the ships' stores, for consumption by passengers and crew on the high seas, with the approval and subject to regulations promulgated by the Treasury Department, in conformity with international usage and the uniform course of American law and regulation from the foundation of the Government. This was a matter of newspaper notoriety and general knowledge. Treasury decisions had been promulgated which sanctioned the practice, and the Attorney General of the United States had declared its legality and laid down the rules under which it should be conducted. And yet, in the legislation of 1921, by which Congress sought to strengthen the law in other directions and to clothe the courts of the Territory of Hawaii and the Virgin Islands with jurisdiction to enforce the act, no mention was made of this subject and no attempt to broaden the scope of the law,

so as to apply it to foreign vessels in American ports. It seems incredible that, if Congress had intended to apply prohibition to foreign merchant ships, it would not have expressed such intention in the amending act. The fact that it did not, furnishes strong evidence that it had no intention of interfering with the well established usages of international commerce. This moreover is emphasized by the fact that § 5 of the amending act expressly dealt with the application of prohibition to common carriers by land and sea.

It is important to note in this connection that the provisions of the Transportation Act of 1920 are expressly applicable to foreign merchant vessels; and yet, neither the framers of the act, nor those who discussed it on the floors of Congress, suggested that the amending act should be broadened so as to make it clear that the possession by a foreign common carrier by vessel within American waters of intoxicating liquors for beverage purposes, was prohibited by our laws.

When Congress legislated with respect to intoxicating liquors in the Territory of Alaska, by Act of February 14, 1917, 39 Stat. 903, it clearly expressed its intention to apply prohibition to vessels within the territorial waters.

So in dealing with the Canal Zone, Congress, unrestricted by the limitations of the Constitution or the Eighteenth Amendment, but legislating as a domestic legislature, enacted § 20, Tit. III, of the National Prohibition Law. It will be noted that this prohibition went far beyond the Amendment or the National Prohibition Act. It not only prohibited the importation but the introduction into the Canal Zone. It absolutely prohibited possession by an individual or his having under his control any of the described beverages. Then, in order to emphasize its intention that these extreme measures should not be extended so as to interfere with foreign commercial intercourse, it added the proviso.

The provisions affecting the Canal Zone in the National Prohibition Act are not included in the general provisions relating to the United States, but in a specific section incorporated in the act to deal with that place. Section 20, Tit. III, places the Canal Zone in a special position. It will be noted that Congress has not said in the proviso that the *act* shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad, but that "this *section*" shall not apply. In other words, as the language of the section goes far beyond the confines of the Amendment and the act, Congress deemed it necessary to disclaim the application of its provisions, that is, the provisions of the *section*, to commerce passing through the Zone. And, therefore, it cannot be that by referring in § 20 to the carriage on the Panama Canal and on the Panama Railroad, Congress intended that no other transportation of liquor anywhere within the United States, or its possessions, was authorized except through the Canal Zone. The proviso completes the legislation by Congress respecting the Zone, but it has no bearing on the interpretation of the act itself in its application to the United States. It does illustrate the care which Congress has taken in this act, as in so many others, to avoid the implication of legislation affecting foreign merchant vessels, save and except in the particulars where its deliberate and expressed policy was to apply legislation to those ships.

IV. Sea stores on merchant ships are considered as part of the ship itself and always have been exempted from tariff and other laws affecting merchandise introduced into the country. 21 Ops. Atty. Gen. 92, 94; Rev. Stats., § 2807, amended by Act June 3, 1892, 27 Stat. 41; *United States v. 24 Coils of Cordage*, Fed. Cas. No. 16,566; *United States v. One Hempen Cable*, Fed. Cas. No. 15,931a; Treasury Circular Dec. 4, 1922; *Brough v. Whitmore*, 4 Term. Rep. 206; *The Dundee*, 1 Hagg. Adm.

109; *Gale v. Laurie*, 5 B. & C. 156; English Marine Insurance Act 1906, Arnould Marine Insurance, 10th ed., vol. 2, p. 1659; *id.* vol. 1, p. 295.

A further proof of the incorporation of stores into the ship is the fact that they are valued by surveyors, when valuing the ship for general average contribution, as part of the contributory value of the ship. Lowndes, General Average, § 76. It is also a very interesting fact that, in the case of many European nations, a separate list of ship's stores is considered as part of the ship's papers, in addition to the ordinary cargo manifest. In this connection see Atherly Jones on Commerce in War, pp. 347-352. *United States v. Hawley & Letzeffsch*, 160 Fed. 734.

The laws of Italy, France, and Holland require merchant ships trading with their ports to carry and furnish liquors for the consumption of passengers and crew. In those cases, liquors are *necessaries* within the meaning of the admiralty law. See *The Satellite*, 188 Fed. 717.

It was, therefore, in pursuance of a long applied doctrine of sea law and the consistent legislative policy that, after the adoption of the Eighteenth Amendment and the passage of the National Prohibition Act, the Treasury Department promulgated regulations covering sea stores of liquors which have been in force up to the present time. The new opinion of the Attorney General, and the decision of the District Court in the present cases, present to this Court the question of whether or not the necessary construction of the Prohibition Law overrules this consistent, uniform, continued policy of our Government, and, disregarding all international comity, imposes our domestic regulations upon all foreign vessels coming into our ports.

V. Even if the foreign steamships within American ports or waters should be considered as territory subject to the jurisdiction of the United States, nevertheless the carriage of intoxicating liquors as part of their sea stores,



under the circumstances described in the bill, is not a violation of the Amendment or the statute.

It is well settled law, that the carriage of ship stores on board a foreign vessel coming into ports of the United States, and on its departure therefrom, is neither importation into, nor exportation from, the United States. *Swan & Finch Co. v. United States*, 190 U. S. 143, 144; *The Conqueror*, 49 Fed. 99, 102; *affd.* 166 U. S. 110.

That the carriage of liquors from one point to another within the United States may not amount to transportation within the prohibition of the Amendment and the statute, is recognized in *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88. *United States v. 254 Bottles of Intoxicating Liquor*, 281 Fed. 247.

The Amendment does not make mere possession of intoxicating liquors unlawful. Its prohibition applies only when one lawfully in possession when the Amendment took effect seeks to sell or transport it within the United States, etc., or to export it therefrom, for beverage purposes. If the National Prohibition Act goes beyond this, it exceeds the authority conferred upon Congress by the Amendment. We do not construe it as going beyond the Amendment. The act, recognizing the lawfulness of possession of liquors in a private dwelling, makes possession elsewhere only *prima facie* evidence that it is possessed for an unlawful purpose, and this evidence, of course, is open to rebuttal by the facts of the case.

The actual basis of *Corneli v. Moore*, 257 U. S. 491, is stated in the *Grogan Case*, 259 U. S. 80.

In the cases at bar, the liquors are in the strictest sense in the lawful possession of the owners of the steamships, and they remain immovable within the ship as a part of its sea stores, in effect as a part of the ship, in the same sense in which a cable which had been bought in Liverpool by the master of an American vessel, to replace an old

one worn out, was held to be a part of the ship and not to be treated as imported goods, wares or merchandise, in the case of *United States v. A Chain Cable*, 2 Sumner, 362; Fed. Cas. 14,776.

The movement of these liquors within our territorial waters, moreover, can in no proper sense be deemed a "transportation" in any accepted sense of the word. The universal and practical conception of transportation, as applied to any article or commodity under any circumstances, presupposes a carrier of some kind or description separate and distinct from the article or thing transported. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203.

In the present case there is not any separation of the sea stores from the ship. They are incorporated as it were into the body of the ship. Properly considered, sea stores are really aids to transportation rather than the subject matter thereof. While, of course, all parts of the vessel, including masts, spars, tackle and apparel, as well as sea stores, necessarily move with her when she moves, they are not being transported in the sense of that word as understood by our statutes or case law. It is submitted that the transportation prohibited by the Eighteenth Amendment and the National Prohibition Act is transportation in a commercial sense. Undoubtedly this was present in both the *Grogan* and *Anchor Line Cases*.

Specific reference to the question of transportation is found in §§ 13 and 14 of Tit. II of the act, and here Congress considers the question in some detail by requiring the carriers to mark the consignors' and consignees' names on the outside of all packages, in addition to making clear the contents.

Under the *Street Case*, *supra*, the conveyance from warehouse to residence was held not to be transportation within the act, because the goods were in the owner's possession in a leased room in a warehouse, and in effect



merely transferred by him to his residence. In the *Corneli Case* a different result was reached because the goods were in possession of the warehouse, and the transfer thereof involved commercial transportation of and delivery to the owner at the latter's residence. Sea stores, like bunker coal, belong to the ship owner and are on board his vessel solely for consumption therein. They are not received from any shipper nor are they to be delivered to any consignee, and transportation is not the purpose of their presence on shipboard. They are brought within the territorial waters of the United States merely because it is unavoidable under the circumstances.

If the National Prohibition Act goes beyond the limits of the Amendment, and prohibits mere possession, it is unsupported by the Constitution, and, to that extent at least, unenforceable. While the language of § 3, Tit. II, does prohibit any person to "possess any intoxicating liquor except as authorized in this act," read in connection with § 33, Tit. II, such unauthorized possession would appear only to be *prima facie* evidence of possession for one of the illegal purposes prescribed in the act, and not in and of itself to be punishable. That this construction is correct is emphasized by the provisions of § 20, Tit. III, where the congressional intention clearly expressed with respect to the Canal Zone is to make possession in and of itself a crime, as also to prohibit, not only the technical "importation" into the Zone, but the introduction of liquor into that specific territory. Not only, too, is possession prohibited, but it is made a crime to have "under one's control within the Canal Zone" any of the specified beverages.

If it be suggested that the Prohibition Act, § 33, Tit. II, makes the possession of liquors by any person not legally permitted by its provisions to possess liquor, evidence that such liquor is kept for purposes prohibited by the statute, the answer is that it is only *prima facie* evidence of that fact.

It is our contention that the cases of liquor carried as part of ship stores in foreign merchant vessels, also fairly fall within the obvious implication of § 33, Tit. II, and that an intention to confiscate the private property in these liquors and to extend the jurisdiction of an act which is, in the most emphatic sense of the term, a domestic police regulation, over the internal concerns of foreign ships, and thus indirectly to foist our laws and our conception of the proper use of alcohol for beverage purposes, over the people of other Nations whose usages and laws differ from ours, has not been expressed by the Eighteenth Amendment nor by Congress.

*Mr. Cletus Keating*, with whom *Mr. John M. Woolsey*, *Mr. J. Parker Kirlin* and *Mr. Ira A. Campbell* were on the brief, for appellant in No. 693.

I. The District Judge erred in holding that intoxicating liquors which have been legally acquired and which are kept and used only as sea stores by vessels of the United States are within the purview of the Eighteenth Amendment.

Sea stores are consumable provisions kept on board a vessel as part of her equipment for the maintenance of her passengers and crew.

Intoxicating liquors, having the status of sea stores and their situs on board a vessel, do not come within any of the prohibitions of the Eighteenth Amendment, although kept on board a vessel of the United States within territorial waters of the United States.

Intoxicating liquors incorporated as sea stores on a vessel, are not the subject of "importation into" the United States.

When a vessel passes out of our territorial waters, sea stores are not the subject of "exportation from" the United States.

Intoxicating liquors incorporated into sea stores, whilst kept on board a vessel of the United States, mov-

ing in territorial waters, are not the subject of "transportation within" the United States.

The possession of intoxicating liquors, lawfully acquired and kept sealed as sea stores, is legal within the territorial waters of the United States.

II. The District Judge erred in holding that vessels of the United States on the high seas and in foreign ports are territory subject to the jurisdiction of the United States, within the meaning of the Eighteenth Amendment, and subject to the penalties of the National Prohibition Act, and hence were not free to sell intoxicating liquors on the high seas and in foreign ports.

The Eighteenth Amendment was not necessary to give Congress power to legislate for lands subject to the jurisdiction of the United States and not included among the several States, or for vessels of the United States engaged in foreign or coastwise commerce.

Vessels of the United States are not "territory subject to the jurisdiction of the United States" within the meaning of the Eighteenth Amendment, nor are they subject to the National Prohibition Act.

The National Prohibition Act does not by its terms apply and was not intended to apply to vessels of the United States on the high seas or in foreign ports.

III. The unnecessary adoption of a fiction in constitutional construction that would attribute to the word "territory" as used in the Eighteenth Amendment a meaning which would include vessels of the United States upon the high seas and in foreign ports, would lead to embarrassing international situations.

IV. Neither the history nor purpose of the Eighteenth Amendment and its enforcement acts indicates any intention on the part of Congress to extend prohibition to vessels of the United States while on the high seas or in foreign ports.

In considering whether Congress intended that vessels of the United States should be considered "territory" within the meaning of the Amendment and the enforcement acts, § 20 of the National Prohibition Act is of great importance.

It seems hardly conceivable that Congress would place an additional obstacle in the way of the establishment of an American merchant marine, when the additional burden imposed was not essential to carry out the fundamental purposes of the prohibition reform. Vessels of the United States engaged in foreign trade go to all parts of the world, and are in competition with ships of foreign nations. The construction of the Amendment and the enforcement acts here contended for would not constitute an interference or limitation upon what everyone realizes is a great national reform.

*Mr. Reid L. Carr*, with whom *Mr. George Adams Ellis* and *Mr. Frederick H. Stokes* were on the brief, for appellants in No. 694.

The word "territory" as employed in the Eighteenth Amendment must be construed according to the meaning fixed upon it in our constitutional history.

A ship is not territory, within the meaning of the Eighteenth Amendment or the enforcing legislation.

As a matter of statutory construction, the Prohibition Acts negative the intention of Congress to extend their operation to vessels of the United States on the high seas or in foreign ports.

*Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt*, Assistant Attorney General, with whom *Mr. Alfred A. Wheat*, Special Assistant to the Attorney General, was on the briefs, for appellees.

*Mr. Andrew Wilson* and *Mr. Wayne B. Wheeler*, by leave of court, filed a brief as *amici curiae*.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

These are suits by steamship companies operating passenger ships between United States ports and foreign ports to enjoin threatened application to them and their ships of certain provisions of the National Prohibition Act. The defendants are officers of the United States charged with the act's enforcement. In the first ten cases the plaintiffs are foreign corporations and their ships are of foreign registry, while in the remaining two the plaintiffs are domestic corporations and their ships are of United States registry. All the ships have long carried and now carry, as part of their sea stores, intoxicating liquors intended to be sold or dispensed to their passengers and crews at meals and otherwise for beverage purposes. Many of the passengers and crews are accustomed to using such beverages and insist that the ships carry and supply liquors for such purposes. By the laws of all the foreign ports at which the ships touch this is permitted and by the laws of some it is required. The liquors are purchased for the ships and taken on board in the foreign ports and are sold or dispensed in the course of all voyages, whether from or to those ports.

The administrative instructions dealing with the subject have varied since the National Prohibition Act went into effect. December 11, 1919, the following instructions were issued (T. D. 38218):

"All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

"Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

"Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same line or owner."

January 27, 1920, the first paragraph of those instructions was changed (T. D. 38248) so as to read:

"All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose. All such liquors on foreign vessels should be sealed on arrival of the vessels in port, and such portions thereof released from seal as may be required from time to time for use by the officers and crew."

October 6, 1922, the Attorney General, in answer to an inquiry by the Secretary of the Treasury, gave an opinion to the effect that the National Prohibition Act, construed in connection with the Eighteenth Amendment to the Constitution, makes it unlawful (a) for any ship, whether domestic or foreign, to bring into territorial waters of the United States, or to carry while within such waters, intoxicating liquors intended for beverage purposes, whether as sea stores or cargo, and (b) for any domestic ship even when without those waters to carry such liquors for such purposes either as cargo or sea stores. The President thereupon directed the preparation, promulgation and application of new instructions conforming to that construction of the act. Being advised of this and that under the new instructions the defendants would seize all liquors carried in contravention of the act as so construed and would proceed to sub-



ject the plaintiffs and their ships to penalties provided in the act, the plaintiffs brought these suits.

The hearings in the District Court were on the bills or amended bills, motions to dismiss and answers, and there was a decree of dismissal on the merits in each suit. 284 Fed. 890; 285 Fed. 79. Direct appeals under Judicial Code, § 238, bring the cases here.

While the construction and application of the National Prohibition Act is the ultimate matter in controversy, the act is so closely related to the Eighteenth Amendment, to enforce which it was enacted, that a right understanding of it involves an examination and interpretation of the Amendment. The first section of the latter declares, 40 Stat. 1050, 1941:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

These words, if taken in their ordinary sense, are very plain. The articles proscribed are intoxicating liquors for beverage purposes. The acts prohibited in respect of them are manufacture, sale and transportation within a designated field, importation into the same, and exportation therefrom. And the designated field is the United States and all territory subject to its jurisdiction. There is no controversy here as to what constitutes intoxicating liquors for beverage purposes; but opposing contentions are made respecting what is comprehended in the terms "transportation," "importation" and "territory."

Some of the contentions ascribe a technical meaning to the words "transportation" and "importation." We think they are to be taken in their ordinary sense, for it better comports with the object to be attained. In that

sense transportation comprehends any real carrying about or from one place to another. It is not essential that the carrying be for hire, or by one for another; nor that it be incidental to a transfer of the possession or title. If one carries in his own conveyance for his own purposes it is transportation no less than when a public carrier at the instance of a consignor carries and delivers to a consignee for a stipulated charge. See *United States v. Simpson*, 252 U. S. 465. Importation, in a like sense, consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act.

Various meanings are sought to be attributed to the term "territory" in the phrase "the United States and all territory subject to the jurisdiction thereof." We are of opinion that it means the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power. The immediate context and the purport of the entire section show that the term is used in a physical and not a metaphorical sense,—that it refers to areas or districts having fixity of location and recognized boundaries. See *United States v. Bevans*, 3 Wheat, 336, 390.

It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles. *Church v. Hubbard*, 2 Cranch, 187, 234; *The Ann*, 1 Fed. Cas., p. 926; *United States v. Smiley*, 27 Fed. Cas., p. 1132; *Manchester v. Massachusetts*, 139 U. S. 240, 257-258; *Louisiana v. Mississippi*, 202 U. S. 1, 52; 1 Kent's Com., 12th ed., \*29; 1 Moore



International Law Digest, § 145; 1 Hyde International Law, §§ 141, 142, 154; Wilson International Law, 8th ed., § 54; Westlake International Law, 2d ed., p. 187, *et seq*; Wheaton International Law, 5th Eng. ed. (Phillipson), p. 282; 1 Oppenheim International Law, 3d ed., §§ 185-189, 252. This, we hold, is the territory which the Amendment designates as its field of operation; and the designation is not of a part of this territory but of "all" of it.

The defendants contend that the Amendment also covers domestic merchant ships outside the waters of the United States, whether on the high seas or in foreign waters. But it does not say so, and what it does say shows, as we have indicated, that it is confined to the physical territory of the United States. In support of their contention the defendants refer to the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor. *Scharrenberg v. Dollar S. S. Co.*, 245 U. S. 122, 127; *In re Ross*, 140 U. S. 453, 464; 1 Moore International Law Digest, § 174; Westlake International Law, 2d ed., p. 264; Hall International Law, 7th ed. (Higgins), § 76; Manning Law of Nations (Amos), p. 276; Piggott Nationality, Pt. II, p. 13. The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty. See *The Hamilton*, 207 U. S. 398, 403; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 355; 1 Oppenheim International Law, 3d ed., §§ 123-125, 128. It is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign. 2 Moore International

Law Digest, §§ 204, 205; Twiss Law of Nations, 2d ed., § 166; Woolsey International Law, 6th ed., § 58; 1 Oppenheim International Law, 3d ed., §§ 128, 146, 260.

The defendants further contend that the Amendment covers foreign merchant ships when within the territorial waters of the United States. Of course, if it were true that a ship is a part of the territory of the country whose flag she carries, the contention would fail. But, as that is a fiction, we think the contention is right.

A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion. The rule, now generally recognized, is nowhere better stated than in *The Exchange*, 7 Cranch, 116, 136, 144, where Chief Justice Marshall, speaking for this Court, said:

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

"All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

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"When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption."

That view has been reaffirmed and applied by this Court on several occasions. *United States v. Dieckman*, 92 U. S. 520, 525, 526; *Wildenhus's Case*, 120 U. S. 1, 11; *Nishimura Ekiu v. United States*, 142 U. S. 651, 659; *Knott v. Botany Mills*, 179 U. S. 69, 74; *Patterson v. Bark Eudora*, 190 U. S. 169, 176, 178; *Strathearn S. S. Co. v. Dillon*, 252 U. S. 348, 355-356. And see *Buttfield v. Stranahan*, 192 U. S. 470, 492-493; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 324; *Brolan v. United States*, 236 U. S. 216, 218. In the *Patterson Case* the Court added:

"Indeed, the implied consent to permit them [foreign merchant ships] to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the government sees fit to impose."

In principle, therefore, it is settled that the Amendment could be made to cover both domestic and foreign

merchant ships when within the territorial waters of the United States. And we think it has been made to cover both when within those limits. It contains no exception of ships of either class and the terms in which it is couched indicate that none is intended. Such an exception would tend to embarrass its enforcement and to defeat the attainment of its obvious purpose, and therefore cannot reasonably be regarded as implied.

In itself the Amendment does not prescribe any penalties, forfeitures or mode of enforcement, but by its second section <sup>1</sup> leaves these to legislative action.

With this understanding of the Amendment, we turn to the National Prohibition Act, c. 85, 41 Stat. 305, which was enacted to enforce it. The act is a long one and most of its provisions have no real bearing here. Its scope and pervading purpose are fairly reflected by the following excerpts from Title II:

"Sec. 3. No person <sup>2</sup> shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

"Sec. 21. Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used

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<sup>1</sup> The second section says: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." For its construction, see *United States v. Lanza*, 260 U. S. 377.

<sup>2</sup> The act contains a provision (§ 1 of Title II) showing that it uses the word "person" as including "associations, copartnerships, and corporations" when the context does not indicate otherwise.

in maintaining the same, is hereby declared to be a common nuisance. . . ."

"Sec. 23. That any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, . . . any liquor . . . in violation of this title is guilty of a nuisance . . . ."

"Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. . . ."

Other provisions show that various penalties and forfeitures are prescribed for violations of the act; and that the only instance in which the possession of intoxicating liquor for beverage purposes is recognized as lawful is where the liquor was obtained before the act went in effect and is kept in the owner's dwelling for use therein by him, his family, and his *bona fide* guests.

As originally enacted the act did not in terms define its territorial field, but a supplemental provision<sup>3</sup> afterwards enacted declares that it "shall apply not only to the United States but to all territory subject to its jurisdiction," which means that its field coincides with that of the Eighteenth Amendment. There is in the act no provision making it applicable to domestic merchant ships when outside the waters of the United States, nor any provision making it inapplicable to merchant ships, either domestic or foreign, when within those waters, save in the Panama Canal. There is a special provision dealing

<sup>3</sup> Section 3, Act November 23, 1921, c. 134, 42 Stat. 222.

with the Canal Zone<sup>4</sup> which excepts "liquor in transit through the Panama Canal or on the Panama Railroad." The exception does not discriminate between domestic and foreign ships, but applies to all liquor in transit through the canal, whether on domestic or foreign ships. Apart from this exception, the provision relating to the Canal Zone is broad and drastic like the others.

Much has been said at the bar and in the briefs about the Canal Zone exception, and various deductions are sought to be drawn from it respecting the applicability of the act elsewhere. Of course the exception shows that Congress, for reasons appealing to its judgment, has refrained from attaching any penalty or forfeiture to the transportation of liquor while "in transit through the Panama Canal or on the Panama Railroad." Beyond this it has no bearing here, save as it serves to show that where in other provisions no exception is made in respect of merchant ships, either domestic or foreign, within the waters of the United States, none is intended.

Examining the act as a whole, we think it shows very plainly, first, that it is intended to be operative throughout the territorial limits of the United States, with the single exception stated in the Canal Zone provision; secondly, that it is not intended to apply to domestic vessels when outside the territorial waters of the United States,

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<sup>4</sup> The pertinent portion of § 20 of Title III, relating to the Canal Zone, is as follows:

"Sec. 20. That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt, or spirituous liquors, except for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes, under regulations to be made by the President, and any such liquors within the Canal Zone in violation hereof shall be forfeited to the United States and seized: *Provided*, That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad."

and, thirdly, that it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters, save as the Panama Canal Zone exception provides otherwise.

In so saying we do not mean to imply that Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long has been settled that Congress does have such power over them. *Lord v. Steamship Co.*, 102 U. S. 541; *The Abby Dodge*, 223 U. S. 166, 176. But we do mean that the National Prohibition Act discloses that it is intended only to enforce the Eighteenth Amendment and limits its field of operation, like that of the Amendment, to the territorial limits of the United States.

The plaintiffs invite attention to data showing the antiquity of the practice of carrying intoxicating liquors for beverage purposes as part of a ship's sea stores, the wide extent of the practice and its recognition in a congressional enactment, and argue therefrom that neither the Amendment nor the act can have been intended to disturb that practice. But in this they fail to recognize that the avowed and obvious purpose of both the Amendment and the act was to put an end to prior practices respecting such liquors, even though the practices had the sanction of antiquity, generality and statutory recognition. Like data could be produced and like arguments advanced by many whose business, recognized as lawful theretofore, was shut down or curtailed by the change in national policy. In principle the plaintiffs' situation is not different from that of the innkeeper whose accustomed privilege of selling liquor to his guests is taken away, or that of the dining-car proprietor who is prevented from serving liquor to those who use the cars which he operates to and fro across our northern and southern boundaries.



It should be added that after the adoption of the Amendment and the enactment of the National Prohibition Act Congress distinctly withdrew the prior statutory recognition of liquors as legitimate sea stores. The recognition was embodied in § 2775 of the Revised Statutes, which was among the provisions dealing with customs administration, and when, by the Act of September 21, 1922, those provisions were revised, that section was expressly repealed along with other provisions recognizing liquors as legitimate cargo. C. 356, Title IV and § 642, 42 Stat. 858, 948, 989. Of course, as was observed by the District Court, the prior recognition, although representing the national policy at the time, was not in the nature of a promise for the future.

It therefore is of no importance that the liquors in the plaintiffs' ships are carried only as sea stores. Being sea stores does not make them liquors any the less; nor does it change the incidents of their use as beverages. But it is of importance that they are carried through the territorial waters of the United States and brought into its ports and harbors. This is prohibited transportation and importation in the sense of the Amendment and the act. The recent cases of *Grogan v. Walker & Sons* and *Anchor Line v. Aldridge*, 259 U. S. 80, are practically conclusive on the point. The question in one was whether carrying liquor intended as a beverage through the United States from Canada to Mexico was prohibited transportation under the Amendment and the act, the liquor being carried in bond by rail, and that in the other was whether the transshipment of such liquor from one British ship to another in the harbor of New York was similarly prohibited, the liquor being in transit from Scotland to Bermuda. The cases were considered together and an affirmative answer was given in each, the Court saying in the opinion, p. 89:

"The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and



obviously meant to upset a good many things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True this discouraged production here, but that was forbidden already, and the provision applied to liquors already lawfully made. See *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 151, n. 1. It is obvious that those whose wishes and opinions were embodied in the Amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay. When, therefore, the Amendment forbids not only importation into and exportation from the United States but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the Amendment itself. The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. Title III, § 20, 41 Stat. 322."

Our conclusion is that in the first ten cases—those involving foreign ships—the decrees of dismissal were right and should be affirmed, and in the remaining two—those involving domestic ships—the decrees of dismissal were erroneous and should be reversed with directions to enter decrees refusing any relief as respects the operations of the ships within the territorial waters of the United States and awarding the relief sought as respects operations outside those waters.

*Decrees in Nos. 659, 660, 661, 662, 666, 667, 668, 669,  
670 and 678,* *Affirmed.*

*Decrees in Nos. 693 and 694,* *Reversed.*

SUTHERLAND, J., dissenting.

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MR. JUSTICE McREYNOLDS, dissents.

MR. JUSTICE SUTHERLAND, dissenting.

I agree with the judgment of the Court in so far as it affects domestic ships, but I am unable to accept the view that the Eighteenth Amendment applies to foreign ships coming into our ports under the circumstances here disclosed.

It would serve no useful purpose to give my reasons at any length for this conclusion. I therefore state them very generally and briefly.

The general rule of international law is that a foreign ship is so far identified with the country to which it belongs that its internal affairs, whose effect is confined to the ship, ordinarily are not subjected to interference at the hands of another State in whose ports it is temporarily present, 2 Moore, *Int. Law Dig.*, p. 292; *United States v. Rodgers*, 150 U. S. 249, 260; *Wildenhus's Case*, 120 U. S. 1, 12; and, as said by Chief Justice Marshall, in *Murray v. Schooner Charming Betsy*, 2 Cranch, 64, 118: " . . . an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."

That the Government has full power under the Volstead Act to prevent the landing or transshipment from foreign vessels of intoxicating liquors or their use in our ports is not doubted, and, therefore, it may provide for such assurances and safeguards as it may deem necessary to those ends. Nor do I doubt the power of Congress to do all that the Court now holds has been done by that act, but such power exists not under the Eighteenth Amendment, to whose provisions the act is confined, but by virtue of other provisions of the Constitution, which Congress here has not attempted to exercise. With great deference to the contrary conclusion of the Court, due regard for the principles of international comity, which exist be-

tween friendly nations, in my opinion, forbids the construction of the Eighteenth Amendment and of the act which the present decision advances. Moreover, the Eighteenth Amendment, it must not be forgotten, confers concurrent power of enforcement upon the several States, and it follows that if the General Government possesses the power here claimed for it under that Amendment, the several States within their respective boundaries, possess the same power. It does not seem possible to me that Congress, in submitting the Amendment or the several States in adopting it, could have intended to vest in the various seaboard States a power so intimately connected with our foreign relations and whose exercise might result in international confusion and embarrassment.

In adopting the Eighteenth Amendment and in enacting the Volstead Act the question of their application to foreign vessels in the circumstances now presented does not appear to have been in mind. If, upon consideration, Congress shall conclude that when such vessels, in good faith carrying liquor among their sea stores, come temporarily into our ports their officers should, *ipso facto*, become liable to drastic punishment and the ships themselves subject to forfeiture, it will be a simple matter for that body to say so in plain terms. But interference with the purely internal affairs of a foreign ship is of so delicate a nature, so full of possibilities of international misunderstandings and so likely to invite retaliation that an affirmative conclusion in respect thereof should rest upon nothing less than the clearly expressed intention of Congress to that effect, and this I am unable to find in the legislation here under review.